OUR CONSTITUTION FOR HAVES OR HAVE-NOTS

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DR. V. A. SEYID MUHAMMAD, M.P.

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The writer in this book has dealt with the various propositions and questions raised in Mr. N.A. Palkhivala's book "Our Constitution Defaced and Defiled". The main features of Mr. Palkhivala's book are his contempt for universal adult franchise, his strong objection to Article 31C and his overemphasis on property rights.

While meeting the arguments of Mr. Palkhivala, the author has brought out the fact that Mr. Palkhivala is using the Fundamental Rights with his own over-emphasis on property rights as a facade to cover up his real objective, namely, the displacement of democracy by a Plutocracy in this country. He has exposed Mr. Palkhivala's deep-rooted contempt for true democracy based on universal adult franchise. The whole of Mr. Palkhivala's thesis in his book is based on the proposition that 'men are born unequal' and those who are born with special gifts only are good enough to rule this country. The author emphasises the fundamental concept of democracy that 'men are born equal' but it is the social, economic and political shackles and fetters which make men unequal and the object and functioning of democratic institutions are to create equal opportunities so that the dignity, human personality and the potentialities

(*Continued on back flap*)

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INTRODUCTION

I have read Mr. N. A. Palkhivala's book "Our Constitution Defaced and Defiled". In the introduction, he has stated : "There are times in a country's history when inaction and silence can be a culpable wrong, and we are living in such times. It is not enough that we believe in our national motto—Truth Shall Prevail. We must take active steps to see to it that falsehood does not have a long innings before the moment of truth arrives."

It is the above statement which has inspired me and compelled me to venture upon writing a rejoinder to the various propositions and statements contained in his book.

In this connection, I recall an incident narrated about the Greek philosopher Aristotle. Another philosopher once told Aristotle very pompously that both of them were striving to arrive at truth. Aristotle is reported to have replied, "But you think that you have already arrived at the truth while I am still in search of it".

It is in this humble frame of mind that I approach the various problems discussed. I have no desire to indulge in cheap sarcasm against any individual or class particularly against politicians, for whom, it appears, Mr. Palkhivala has a special dislike.

In his book Mr. Palkhivala has very impressively marshalled quotations from Plato to Pascal, from Lord Acton to Maurice Chevalier. Generally speaking, facts and arguments should be strong enough to stand by themselves without having to resort to the crutches of lengthy quotations. His quotations are impressive and profound. Nobody need quarrel with them. But what

one differs from is the fact that many of those are used out of context and the inferences and reasoning which are derived from them are not always justified.

The various problems are dealt with objectively in this book. The Procrustean method of twisting arguments and bending facts to suit conclusions already arrived at has been avoided as far as possible. Expressions like "freedom", "liberty" and "right" are used throughout this book in relation to the entire citizens of this country and not as exclusive preserves of any particular class or group of individuals.

The main features of Mr. Palkhivala's book are :

(1) He does not approve of a system of democracy based upon universal adult franchise ;

(2) He holds that Parliament's powers to amend the Constitution are subject to inherent and implied limitations ;

(3) Property Rights are the foundation of all our Fundamental Rights and they constitute "essential features of our Constitution which cannot be amended" ;

(4) Men are born unequal ; and

(5) He considers the Twenty-Fifth Amendment (which introduced Article 31-C) in the Constitution as the *bete nour* and an outrage on the Constitution.

In the following pages attempt has been made to deal with the above. It has to be admitted that it is not an easy task to isolate the essence of Mr. Palkhivala's propositions from a maze of quotations and assertions but it is hoped that the object with which this is written, namely, the arrival at truth, will be achieved.

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16TH MARCH, 1975

V. A. SEYID MUHAMMAD, M.P.

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CHAPTER 1

GENERAL OBSERVATIONS

On page 2 of Mr. Palkhivala's book, he expresses his gratitude for the privilege accorded to him to deliver the "John F. Kennedy Memorial Lecture" under the auspices of the Indo-American Society. From the heading of the Chapter "Democracy and Freedom—in India and the U.S.A." one would expect a balanced treatment of democracy, its merits and demerits in both the countries. But while throughout the book the operation and the functioning of the Indian democracy is adversely criticised, one does not find any such criticism with regard to the American democracy.

Possibly, Mr. Palkhivala's sense of propriety must have prevented such criticism. But does not propriety also require that a too severe censorial attitude to either country should have been avoided in a memorial speech before a joint Society? Or is it a case of trying to be more loyal than the King, one wonders? Perhaps this may be a "Permissible means of achieving" his ends ? Or is it a method made to measure?

The sovereign people of this country through our Constitution have chosen a democratic system based on universal abult franchise. But Mr. Palkhivala treats this very foundation of our democracy with utter contempt. At various places, he has expressed his aversion to our sacred system by using the expression "mobocracy", "noes counting" and "one man one vote rite". He observes : "It is a reflection on the drawbacks of democracy that the happiest periods which civilized man has known have been under benign and enlightened rulers who were not elected on the basis of adult franchise." Mr. Palkhivala describes the seeking of the mandate of the people through universal adult franchise as the "cheap talent to catch votes by making glib promises." At another place he states, "democracy depends upon habits of consent and compromise which are attributes only of a cultivated and sophisticated political society." Further down he observes : "When you live in a democracy, you live in hazard. There is no amenable God in it, no particular concern or particular mercy. A bad government is the inevitable consequence of an indifferent electorate." It is his confirmed conviction, "elections mostly throw out either mediocrity or extremism into power".

With great reluctance and after quoting

Maurice Chevalier to give him moral strength Mr. Palkhivala very grudgingly admits that democracy is the only alternative. He states : "What are the alternatives to democracy? Monarchy, oligarchy or dictatorship. If you have monarchy, history proves that the odds are frighteningly heavy against your being blessed with an Ashoka or Aurelius. Oligarchy and dictatorship have seldom produced national happiness. We would thus be well advised to count our blessings in a democracy rather than be frustrated by its distressingly dark side." He is not happy since he feels that "modern democracy is only a caricature of democracy to be." But he is optimistic and with the air of an oracle, he forecasts, "Democracy is bound to evolve; and it will shed, in course of time, the infirmities and shortcomings which often make it so ludicrous today."

Mr. Palkhivala has made a great discovery : "The main infirmity of democracy is that the only job for which you need no training or qualification whatsoever is the job of governing and legislating". However original this idea must have seemed to himself, one can assure Mr. Palkhivala, that is precisely what many of the self-opinionated members of the I. A. S. cadre, starting from a junior Collector to the hard-boiled Chief Secretary, say to justify their self-

assumed importance.

What is the remedy which Mr. Palkhivala prescribes? His optimism gets the better over his cynicism and he says: "A time is bound to come when, in every well-regulated democracy, adequate training and equipment will be prescribed by law or recognised by convention as essential qualifications for a man who aspires to make laws or govern a state."

It is difficult to find a common ground when a deep chasm separates points of view on fundamental concepts. Whether Mr. Palkhivala likes it or not, Indian democracy is based on universal adult franchise and will continue to be so. According to his conception a well-trained elite should govern this country. He should not forget that in no democratic country a cadre of politicians have been trained in a political "public school" to govern the country.

None of the great democratic figures of the world, it may be noted, were groomed and trained in something like a political "princess school". Each one of them had his own profession but it is not as experts in their profession that they have successfully ruled as great democrats. One is not aware, for example, that Abrahim Lincoln had a political school degree or diploma or he underwent apprenticeship in a political Senior's Chamber for a

prescribed period of time to acquire acceptance as a person competent to be a ruler in the great American democracy.

It may also be noted that something analogous to what Mr. Palkhivala has suggested existed in China at one time but that vicious Mandarinate became corrupt, oppressive and discredited and was discarded for ever. The upper class has often deluded itself that a special, privileged class alone is entitled to rule and the millions and millions of ordinary people should not have any say in choosing their representatives to rule over the destinies of nations. But fortunately with all their ignorance as well as economic and social backwardness, the mighty sovereign people of this country are intelligent enough to accept, cherish and hold dear to their heart the foundation of our democracy, namely, universal adult franchise.

It is true that most of them have not even heard about the great historians and political pandits whom Mr. Palkhivala so profusely quotes but they are not prepared and will not be prepared to give up their basic right to choose their representatives simply because it does not suit the theories, concepts and interests of the Indian privileged class and its spokesmen. It may be in the proposed training school many of the persons of Mr. Palkhivala's way of thinking may

secure very high marks but with their attitudes and approaches they will not be able to beguile the masses of this country to vote for them. Perhaps this credibility gap may be the reason for their cynical contempt for the sacred institution of universal adult franchise and representative democracy.

It cannot be denied that on every issue which Mr. Palkhivala has discussed and expressed his strong views there are almost equally divided opinions among jurists and political thinkers. On every issue, the Supreme Court has given different opinions from time to time. The Judges holding divergent views are almost equally divided. One can understand that on such fundamental issues a person feels strongly but to go beyond that and to write a book asserting that the Constitution is "defaced and defiled" and democracy and our constitutional structure is being deliberately "destroyed" by the Government in power is inconceivable. Doing so will tantamount to abandoning one's intellectual objectivity and balanced views and travelling in the realm of exaggeration and motivated political propaganda. If political propaganda is all that matters, the very basis of the apparent anxiety for the future of democracy would be under suspicion.

While condemning, 'mobocracy", there is

one point which Mr. Palkhivala has omitted. It is all right according to his concept to label sarcastically the system of election based on universal adult franchise as "mobocracy". But what about the real "mobocracy" which has been going on in this country for some time now. Duly elected legislatures were in existence in various States, like Gujarat, Bihar, etc. These legislatures came into existence with the massive mandate of the electorate. These legislatures were elected for the specific term of five years. There is no provision in our Constitutional system for recalling the elected representatives before their term is over. Yet movements were launched for the dissolution of these legislatures because one individual or some leaders of certain political parties which the electorate have repeatedly rejected decided that the duly elected legislatures have lost their mandate. In order to bring about the downfall of these legisaltures people's representatives have been beaten up, confined, coerced and subjected to various other oppressive tactics and humiliations. If this is not "mobocracy" what else is "mobocracy" and if this is not the surest way of destroying our democratic system what else is? Yet Mr. Palkhivala did not think it necessary to speak even one word about this fundamental question. He has

only words—and very strong words too--for unjustly accusing the Government alone for "defacing" and "defiling" the Constitution and for "destroying" democracy. From the newspapers one understands that Mr. Palkhivala has associated himself with the current agitation referred above. Again one has to express one's deep regrets that Mr. Palkhivala has abandoned his objective constitutionalism and descended to the level of undemocratic political partisan views and actions.

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CHAPTER II

FUNDAMENTAL RIGHTS

Concepts of "freedom", "liberty" and "rights" have changed from age to age and from society to society. At one time, to deal with slaves as one's property as one liked was considered a very fundamental right of the slave owners. Today, slavery itself has been abolished throughout the civilized world and the practice of slavery will end up with penal consequence. Any person who asserts his freedom to practise slavery will find himself in the lunatic asylum or in the jail. The freedom, liberty and rights of the feudal lord based on the tenurial and political relationship then existing were swept away by the industrial revolution. The freedoms of the mercantilists were altered and eroded by the industrial society. The industrial society itself developed and came to be based on political liberalism and economic *laissez-faire* philosophy of Adam Smith.

After the Proclamation of Victoria the political and economic concepts of this libralism gradually began to take roots in this country. A new elite trained to think and believe in those concepts through the medium of Western educa-

tion emerged in India. The more they got educated and the more they imbibed the Western concepts of liberal democracy, the more they yearnd to have the benefits and enjoyment of those Western liberal institutions and principles. The establishment of the Indian National Congress and the subsequent struggle accelerated this yearning and aspiration.

The more the Indian intelligentsia learnt about English democratic system the more they became dissatisfied about the absence of its blessings in this country. Starting from the demand for representation in the services they passed through the various struggles and step by step through the stages of Minto-Morley and Montague-Chelmsford Reforms, Round Table Conferences and the Government of India Act, 1935—and ultimately achieved Independence in 1947.

An industrialist class also developed which realised that unless the country is liberated from the monopolistic hold of the British industrial and trading interests in this country, backed by the might of the British Empire, it cannot expand and build an industrial infrastructure of its own to benefit from the vast potential of the domestic market and prospective international market. Except for the fact that to this extent its interests clashed with the

British rule basically, its attitudes and philosophy were also of those of the *laissez-faire* liberal democracy. It was in its interest to achieve freedom from the British rule and freedom meant a freedom to exploit the vast resources and man-power of this country in order to replace the White industrial empire by a Brown one.

Side by side with the above-class of liberal democrats there was the vast majority of the oppressed, illiterate, ignorant and poverty stricken teeming millions of this country. To them freedom and liberty meant not only freedom to enjoy the basic civil rights but also freedom and liberty from exploitation, want, poverty and ignorance. They fought their epic non-violent battles and made heroic sacrifices not to win the freedom for the industrialist or the rich class only but to achieve freedom for themselves also. It is a fortunate fact of history that it was a compelling necessity for all, the rich, the middle class and the poor that India should gain independence. It was a pre-condition for the attainment of their cherished objects and aspirations however different those objects and aspirations were.

After the attainment of Independecce, when the Fathers of the Constitution assembled to draft the Constitution, all these interests, attitu-

des and aspirations were represented. The drafting of the Constitution required experts and the bulk of the experts was constituted of persons who were Western educated and by training and aptitude they were proponents of liberalism.

They wished to give primacy and predominance to the basic freedoms in the above sense particularly with an over emphasis on property rights. While the section which represented the aspirations of the have-nots and the uneducated also desired the basic civil liberties, their emphasis was not on property right but on social welfare principles and against exploitation by and concentration of wealth in a few hands. In the face of the various points of view and interests, ultimately a consensus was evolved and this consensus is reflected in the Chapter on Fundamental Rights and the Directive Principles.

It is evident therefore that when we talk of freedom and liberty with reference to the Indian Constitution those concepts should be perceived in the special historic and other circumstances and the realities of the Indian situation. It is also a historic fact that Indian society has not undergone, neither a true feudalistic phase nor a full fledged industrial revolution. It was based on a self-sufficient, almost, autonomous economic

units of the villages constituted of mainly, if not solely, of the peasantry and craftsmen.

Even when the British engrafted some of the features of the industrial society on to the Indian society for their own benefit and even though an indigenous industrial is class came into existence no transformation of the village system into a modern industrial society took place to an appreciable degree. In the context of the economic, social and political structure and the background of the Indian society, it is absolutely inappropriate and unjustified to depend upon quotations and concepts of the Western liberal democrats however valid they may be in the context of the conditions prevailing in Western countries and to try to apply them here wholesale as gospel truths.

To treat certain legal and political concepts as immutable propositions of universal validity irrespective of the social necessities and special conditions and compulsions is a sure road to disaster. Viewed in this correct prospective, many of Mr. Palkhivala's statements lend a different colour. By expressing this view one should not be misunderstood as propagating something against the Fundamental Rights and freedoms embodied in our Constitution.

Various freedoms contained in the Fundamental Rights Chapter are as dear to each and

every one of the citizens of this country as they are to Mr. Palkhivala. The only difference is that one certainly questions the immutability of legal and constitutional provisions and the dogmatic assertions which ignore the hard facts and compulsions. This approach is embodied in the saying that "the Law is made for Man and not Man for Law."

In the Chapter on Fundamental Rights and in various other chapters, Mr. Palkhivala has contemptuously scoffed at as the "destructive instinct" of politicians "with their juvenile chatter aboutt he democratic will of the people". As already noted Mr. Palkhivala has persistently tried to bilittle the rights and powers vested in the common people to elect the representatives of their choice and exercise their political power through them. He is entitled to his own opinion and his special attitude, but one has to remember that it is not a special feature of this country that the assertion of political power on the one hand by the repository of such power and the economic power of the property-owners on the other. This conflict of powers is bound to be there in any country particularly where a democratic system exists.

It is to resolve this conflict that in the democratic constitutions, a judicial body with review or controlling authority has been created. This

phenomena has been existing in America as well. Mr. Robert H. Jackson has this to say :

"Two kinds of power seem always in competition in our democracy : there is political power, which is the power of the voters, and there is the economic power of property, which is the power of its owners. Conflicts between the two bring much grist to the judicial mill. The basic grievance of New Delhi was that the Court has seemed unduly to favour private economic power and always to find ways of circumventing the efforts of popular government to control or regulate it."*

The above conflict exists not only between the political power and the economic power but also conflicts arise when the political power is asserted and claims of individual liberty are advanced. Such conflicts have arisen throughout the ages in all countries and the democratic system resolves these conflicts by the well-known device of checks and balances.

This being the historical and constitutional fact, it is rather amazing that a man of Mr. Palkhivala's learning of constitutional law should pretend as if the assertion of political power by the Indian Government is something unheard of or abhorrent to the concept of

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* "The Struggle for Judicial Supremacy" by Robert H. Jackson.

democracy or that the Government is determined to destroy democracy and to establish tyranny or political dictatorship. It is true that some legislations and executive actions in this country have been struck down by the courts as *ultra vires* or illegal. Considering the enormous number of Acts, Ordinances, Regulations, Orders, etc. passed in recent times the number of such instances is small.

To point out those instances and to cry wolf is rather far-fetched. Can Mr. Palkhivala cite a single democratic country wher such judicial intervention has not taken place? Has it not happened a thousand times or more in America, Mr. Palkhivala's El Dorado? Have not the English Courts struck down executive actions? If Mr. Palkhivala's sole idea is to condemn the Indian Government he is free to do so. But the method he has adopted and the concealment in his learned book of similar situations in other democratic countries as pointed out above and singling out the Indian Government for blind derision and censure do not appear to be "permissible means". It may be a method "made to measure" to suit his political ends. One may say that it is tolerable as a political gambit but even with the aura of Mr. Palkhivala's fame it still remains a bitter pill to swallow.

It is relevant here to give a short summary of the history of the concept of Fundamental Rights :

"Why was it necessary to have the Fundamental Rights at all and make them justiciable ? As we seem to be forgetting our own history so soon let me say that the answer lies there. The Nationalist Movement and the birth of the Indian National Congress in 1885 were the direct result of the discriminatory treatment of the Indians in their own country. The demand for the guarantee of Fundamental Rights had unfortunately to be made then to a foreign ruler and it appeared in the Constitution of India Bill framed by the Indian National Congress ten years later. All that is valuable to an Individual in civilized society, including free speech, imprisonment only by a competent authority, free state education, etc. were claimed therein. Resolutions of the Congress since then reiterated this demand and the securing of Fundamental Rights in any future Constitution became one of the articles of faith. To cut the narration short, the main steps may only be mentioned. Mrs. Besant's Commonwealth of India Bill 1925 with its seven fundamental rights (the precursor of Article 19), the Madras Congress Resolution of 1927—"A constitution on the basis of declaration of

rights"—the Nehru Report—"it is obvious that our first care should be to have the Fundamental Rights guaranteed in a manner which will not permit their withdrawal in any circumstances"—, the draft article in the Nehru Constitution—"No person shall be deprived of his liberty, nor shall his dwelling or property be entered, requisitioned or confiscated save in accordance with law"—, the Independence Resolution of 26th January, 1930—"We believe that it is the inalienable right of the Indian people, as of any other people, to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth"—, the Karachi Resolution on Fundamental Rights, Economic and Social Change (1931), the Sapru Report (1945) which for the first time distinguished between justiciable and non-justiciable rights, the suggestion of the Cabinet Mission for the constitution of an Advisory Committee on Fundamental and Minority Rights, and, lastly the Committee on Fundamental Rights of the Constituent Assembly, are just a few of the steps to be remembered. 'The Fundamental Rights and the Directive Principles were the result."*

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* (1967) S.C.R. (2) pp. 762 at p. 859 *Golaknath* v. *State of Punjab* (Hidayatullah J.)

Mr. Palkhivala has extolled the civil rights and liberties. Nobody has a quarrel about it. The complaint is actually the other way round. While paying lip service to these basic human rights, he has tried to undermine the very foundation of these rights. He has observed : "It is precisely because men are born unequal that the fundamental right to equality before the law becomes so essential." It is an astounding proposition that men are born unequal. The very concept of democracy postulates that every man is born equal but men are in chains and fetters forged by the society. These chains and fetters are created by social, economic and political conditions.

Inequality is the result of man-made institutions and laws, which deny equal opportunities and create conditions of exploitation of the slave by the slave-owner, the serf by the feudal Lord, the peasant by the landlord, the workers by the capitalists and the common man by the tyrant. Men born equal become unequal by reason of these oppressive conditions and denial of opportunities to develop their human personalities. It is to redress the imbalances so created, to establish favourable conditions for the development and flowering of human personality and to provide opportunities through which equality can be nurtured that

the Constitution provides for the Fundamental Rights and the Directive Principles. If men are basically unequal as Mr. Palkhivala says the creation of external circumstances, however generous they may be, will not make unequals equals in the true sense of the term.

It is this basic fallacy in Mr. Palkhivala's thesis which has caused the amazing distortions in his approach, views and statements. It is this basic weakness which has given his book an atmosphere of a surrealist nightmare.

It is easy to condemn and ridicule radicalism and socialism since it is the fashion in the posh circles in which Mr. Palkhivala lives and thrives and for a person who earnestly believes that men are born unequal. Radical thinking in this country and anywhere else is anchored in humanism which recognises human autonomy and dignity. There cannot be these considerations when one starts with the premise that men are born unequal. Inequality does not generate respect for the dignity and personality of every human being.

Viewed in this light, the significance and importance of the Directive Principles contained in the Constitution become all the more important. It is to be noted that while most of the Fundamental Rights are negative mandates to the States, the Directive Principles are positive

objectives which the States have to achieve. That means, the States are forbidden from taking steps which impair the Fundamental Rights. They are commanded to take positive steps for achieving the objectives contained in the Directive Principles. One fully agrees with Mr. Palkhivala when he says that Directive Principles are the directory ends of Government, while the Fundamental Rights are only the permissible means for achieving those ends.

Nobody wishes to advocate the abolition of the Fundamental Rights at the cost of the Directive Principles or to say that the ends justify the means. What is attempted by the Government is to achieve the ends through the permissible means including the resort to the permissible restrictions sanctioned by the Constitution itself. Some times the boundaries of restrictions are crossed.

Fully realising the limitations of human beings, the Constitution-makers have provided a machinery, namely, the judiciary to arbitrate between the conflicting claims which are bound to arise in any society.

As already stated such conflicts are not a special feature in this country or a deliberate crime committed on democracy by the Indian Government. Whenever this happens the judiciary calls a halt, and the Government of

this country has never defied the judiciary.

What it has tried when the permissible means, namely, Fundamental Rights are not found adequate to achieve the vital objectives and the judiciary has pointed out the boundaries and limitations, is to invoke legitimate and permissible constitutional means to rectify the situation. This again is not a peculiar feature in this country. It has happened elsewhere also.

The realities of political situation are not to be assessed by abstract theories of doubtful valdity and the solutions to pressing problems are not to be sought in the musty labyrinthine corridors of one's mind. Hard facts of life are difficult to bend. The life and death problems of the teeming millions cannot be ignored by merely rubbing them on the touchstone of philosophy and metaphysics of intellectuals. Provided the constitutional limitations are not crossed and actions are in accordance with the powers and procedures granted by the Constitution including the power of amendment, the Government should not hesitate to discharge their sacred mandates of the sovereign people for whom Mr. Palkhivala has a chronic contempt. It is futile and meaningless to take a purist and doctrinnaire view which defeats the very purpose and object of the Constitution. Theories are for men and men are not for theories.

CHAPTER III

RIGHT TO PROPERTY

In the Chapter "The Right to Property" Mr. Palkhivala has stated that "this right is of the essence of a sound body politic and of a democracy which aims at marching forward economically". He has further stated : "It would be no exaggeration to say that without the right to property it would be impossible to work the Constitution."

It is not the intention to deny the importance of property right in the Constitution. What is objected to is Mr. Palkhivala's over-emphasis on property right and his attempt to prove that it is the foundation of all other civil rights for the enjoyment of which property right is essential. By stating that property has become "a dirty word" today and liberty will become a dirty word tomorrow Mr. Palkhivala is trying to create a bogey.

One does not understand in whose parlance property has become a dirty word. Neither the ruling party nor the Government has at any time declared as its policy the abolition of private property altogether. What has been the policy of the Government is that the private

property should serve the welfare of the masses and it should not be used for anti-social purposes and anti-social activities. Mr. Palkhivala himself agrees to this proposition when he says: "Undoubtedly, the right to property must always remain subject to the need of achieving the welfare of the masses and the necessity of fair and reasonable distribution of income and wealth."

The difference arises not only regarding the kind or quantum of property that a person should be allowed to hold but also regarding the necessity of controlling and restricting it in order to serve social and national ends. There is also serious difference of opinion as to the dominant position it is occuyping as one of the Fundamental Rights.

The most important controversies which have come before the courts in the field of Fundamental Rights relate to the right to property in spite of the fact that many eminent jurists and political philosophers have questioned the correctness of the inclusion of the right to property as a Fundamental Right.

For example, Justice Hidayatullah in the Golaknath's case has said : "In my opinion, it was an error to place it in that category". He further stated : "Perhaps the dead hand of section 299 of the Constitution Act of 1935 was

upon the Constituent Assembly. Ignored were the resolutions passed by the National Planning Committee of the Congress (1941) which had advocated the co-operative principle for exploitation of land, the resolution of 1947 that land with its mineral resources and all other means of production as well as distribution and exchange must belong to and be regulated by the community, and the warning of Mahatma Gandhi that if compensation had to be paid we would have to rob Peter to pay Paul."*

The concept of property right has varied from time to time and country to country. Many do not consider it even as a natural right. A distinction has always been made between personal property, that is property for personal use and other types of private property. It is not the first category that matters. It is the second category we are mainly concerned with. Regarding the concept of private rights on land there has been considerable difference as to the nature and extent of that right. Even today, in certain countries no freehold right on land is recognised. Only leasehold right is permitted. The division of property into movable and immovable, tangible and intangible, are also steps in the evoluation of property rights.

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* (1967) S.C.R. (2) pp. 762 at p. 887 *Golaknath* v. *State of Punjab* (Hidayatullah J.)

Distinctions have been made between properties which are essential for public utility and public purposes and essential for the welfare of the community and State and which are not. More restrictions or even total prohibition have been considered permissible in the case of property right found to be socially harmful. Squeezed between the mortal jaws of powerful trade unions and mighty combines and cartels the workers have practically lost there weapons of bargain and free contract. An individual share-holder in a company has become a mere insignificant element and in the face of the all powerful Directors Board his rights except the right to receive dividends have become notional.

But throughout ages two things have been accepted :

(a) There cannot be any property right which can originate or exist without the sanction of law, that is to say, property rights are the creation of law; and

(b) These rights are subject to the laws made by the State.

It is only with regard to the extent and nature of the State intervention that controversies and disputes have arisen. In short, there is no inherent or natural right to property.

The Industrial Revolution ushered in new types of property rights, concepts and relations. Demands for the maximum freedom for the exercise of rights of property came to the forefront. This was reflected in the theory of Adam Smith and the *laissez - faire* school. But when the First World War broke out, many countries found it necessary to control property and property rights to a large extent. Further, in the highly industrialised countries the growth of the great cartals, combines and corporations with their enormous economic and even political powers and influence in both national and international spheres compelled the State to intervence, particularly when it was felt that these giant companies were operating in spheres traditionally and legitimately held to belong to the State. The result was the passing of anti-monopoly, anti-trust and anti-restrictive trade practice legislations and measures in many conntries.

As a result of the emergence of Soviet Russia after the First World War and other Socialist countries after the Second World War and a socialist Government in England, State intervention came to be on the increase. The great economic depression also necessitated State intervention. So, what has been happening from the First World War onwards was a definite

deviation from and rejection of the *laissez - faire* liberal concepts.

This trend was not solely or mainly due to the Socialist theory and philosophy but also due to the compelling economic and State necessities even in the capitalist countries. Planned economy with considerable extent of State intervention has come to stay and it is not wise or sound to look back nostalgically to the spacious Victorian days. To measure and test the actions of the 1970's in India with the theories and outlook of the late 19th century England is to make ourselves look like ludicurous Rip Van Winkles. If wittingly or unwittingly we behave like Rip Van Winkle others cannot be blamed for branding our views and attitude as anachronistic.

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CHAPTER IV

THE DIRECTIVE PRINCIPLES AND TWENTY-FIFTH AMENDMENT OF THE CONSTITUTION

The Twenty-fifth Amendment came into force on April 20, 1972. The main features of the Twenty-fifth Amendment are :

(1) The expression "compensation" in Article 31 (2) was substituted by the expression "amount".

(2) Article 31C was introduced.

It is understandable that Mr. Palkhivala is outraged. His reaction is as follows :

"First, it amended Article 31(2) and provided that anyone's property may be acquired on payment of an "amount" instead of "compensation". "The intention was that the citizen's right to property should be transformed into the State's right to confiscation and the State should be able to deprive anyone of any property in return for any amount payable at any time on any terms; and the executive action, however arbitrary or irrational, should not be subjected to the Court's scrutiny. Such State action may have a direct impact on any of the other Fundamental Rights, the exercise of which

would be impeded or negatived by the deprivation of property without compensation, the only exception being the case of educational institutions dealt with in the proviso to Article 31(2). Publishers may be deprived of their printing presses and buildings, trade unions of their properties, professional men of professional assets, all without compensation, and thus the Fundamental Rights to freedom of speech, to form unions, and to practise any profession,—guaranteed by Article 19 (1) (a), (c) and (g)—can be eroded or extinguished. The amended Article 31 has nothing to do with the concentration of wealth and permits any common citizen's property, however small in value, to be acquired by the State without the payment of what would be compensation in the eye of the law."

He views Article 31C as a "monstrous outrage on the Constitution". Parodying Winston Churchill's famous speech, Mr. Palkhivala states: "In the entire history, never were so many hundreds of millions deprived of so many Fundamental Rights at one fell swoop as by the insertion of Article 31C." He does not stop there but goes on to say : "This Article has a built-in mechanism for the dissolution of the true democracy that India has been so far, cessation of the rule of law and possible disinte-

gration of the nation." He feels certain that the Government wlll abuse the power under Article 31C.

As an example to strengthen the fear generated by himself he cites the instance of the nationalisation of general insurance companies and in particular the payment of Rs. 10,000/- as compensation for acquisition of net assets worth more than Rs. 23 lakhs. So also he bemoans the nationalisation of coal-mines.

Mr. Palkhivala detects seven-fold sins in Article 31C and he asserts that Article 31C seeks to subvert seven essential features of the Constitution, which are given below :

1. It gives a blank charter to Parliament and all the State Legislatures to defy and ignore the constitutional mandate regarding human rights.

2. Article 31C subordinates the Fundamental Rights to the Directive Principles of State policy and in effect abrogates the rights as regards laws which the legislature intends or declares to be for giving effect to the Directive Principles.

3. That article has the effect of virtually authorising abrogation of the Fundamental Rights while they still remain ostensibly on the statute book.

4. Within its field, Article 31C completely takes away.

(a) The right to acquire, hold and dispose of property (Article 19(1) (f));

(b) The right not to be deprived of property save by authority of law (Article 31(1));

(c) The right to assert that property can be acquired or requisitioned by the State only for a public purpose (Article 31(2)) ; and

(d) The right to receive an "amount", however small, when the State seizes the property (Article 31(2)).

In short, Article 31C expressly authorises outright confiscation of any property, large or small, belonging to anyone, poor or rich, citizen.

5. A citizen is not even permitted to raise the question whether the proposed law will result, or is reasonably calculated to result, in securing the Directive Principles laid down in Article 39(b) or (c).

6. A basic principle of the Constitution is that no State legislature can amend the Fundamental Rights or any other part of the Constitution. This essential feature is repudiated by Article 31C which empowers even State legislatures to pass laws which virtually involve a repeal of the Fundamental Rights,

7. Under the guise of giving effect to the

directive principles, a number of steps can be taken which may seriously undermine the position of regional, linguistic, cultural and other minorities.

Summing up the effect of the seven mortal sins Mr. Palkhivala states Article 31C has damaged the very heart of the Constitution. He apprehends : "This poisonous weed has been planted.

'Where it will trouble us a thousand years,
Eeach age will have to reconsider it.'

Before one examines how far his apprehensions and anxiety about the impending constitutional dooms-day are justified one has to clearly understand the circumstances which led to the Twenty-fifth Amendment and the objects and reasons for that amendment. The basic question involved is the correlation of the Fundamental Rights and the Directive Principles. As will be evident from the following discussion the crucial issue is how far property rights and the power of the Parliament and State Legislatures to make laws for the achievement of the objectives contained in the Directive Principles can be reconciled.

The Directive Principles (Part IV) of the Constitution (given as Appendix I) comprise Articles 36 to 51.

Article 36 states that in this part the State

has the same meaning as in Part III.

Article 37 states that the provisions contained in this part are not justiciable. But "the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

By Article 38, the State is commanded "to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

Article 39 gives a mandate to the State that it shall direct its policy towards securing to all citizens :

"(a) that the citizens, men and women equally, have the right to an adequate means of livelihood ;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve to the common good ;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production the common detriment ;

(d) that there is equal pay for equal work for both men and women ;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength ;

(f) that childhood and youth are protected against exploitation and against moral and material abandonment."

Article 40 deals with the duty of the State to establish Panchayati Raj.

Article 41 enjoins upon the State within the limits of its economic capacity and development, to secure right to work, education, old age, sickness, etc.

Article 42 makes provisions for secursng just and humane conditions of work and for maternity relief.

Ariicle 43 directs the State to endeavour to secure for the citizens a uniform civil code throughout the territory of India.

Article 45 imposes a duty to secure free and compulsory education for all children up to the age of 14.

Article 46 provides to promote educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and protect them from social injustice and all forms of exploitation.

Article 47 defines the duties of the State in the matter of raising the level of nutrition add the standard of living and to improve public health and endeavour to introduce prohibition of ihe consumption, except for medicinal purposes, of intexicating drinks and of drugs, which are injurious to health.

Article 48 deals with the organisation of agriculture and animal husbandry. It shall be the duty of the State to organise agriculture and animal husbandry on modern and scientific lines and to take steps for preserving and improving the breeds, and prohibit the slaughter of cows and calves and other milch and draught cattle.

Article 49 deals with the protection of monuments and places and objects of national importance.

Article 50 commands the State to take steps to separate judiciary from executive.

Article 51 makes it a positive duty of the State to :

"(a) Promote international peace and security ;

(b) Maintain just and honourable relations between nations ;

(c) Foster respect for international law and treaty obligations in the dealings of organised peoples with one another ; and

(d) Encourage settlement of international disputes by arbitration."

Mahatma Gandhi's concern for the *Daridra Narayan* of this country was the motive-force behind his entire philosophy of action and the epic struggles through which he led the nation to Independence It is very relevant to quote him in this connection :

"The contrast between the palaces of New Delhi and the miserable hovels of the poor labouring class nearby cannot last one day in a free India in which the poor will enjoy the same power as the richest in the land. A violent and bloody revolution is a certainty one day unless there is a voluntary abdication of riches and the power that riches give and sharing them for the common good. I adhere to my doctrine of trusteeship inspite of the ridicule that has been poured upon it."*

In his simple and straight forward language he clearly pointed out that :

"I suggest that we are thieves in a way, if I take anything that I do not need for my own immediate use and keep it, I thieve it from somebody else.....It is the fundamental law of Nature, without exception, that Nature produces enough for our wants from day to day;

* "Trusteeship by M.K. Gandhi", Navajivan Publishing House Ahmedabad, page 15.

and if only everybody took enough for himself and nothing more, there would be no pauperism in this world, there would be no man dying of starvation in this world.....I am no Socialist, and I do not want to dispossess those who have got possessions ; but I do say that personally those of us who want to see light out of darkness have to follow this rule. I do not want to dispossess anybody ; I should then be departing from the rule of *Ahimsa*. If somebody else possess more than I do let him. But so far as my own life has to be regulated.....I dare not possess anything which I do not want. In India we have got many millions of people who have to be satisfied with one meal a day, and that meal consisting of a chapati containing no fat in it and a pinch of salt. You and I have no right to anything that we really have until these many millions are clothed and fed. You and I, who ought to know better, must adjust our wants, and even undergo voluntary starvation in order that they may be nursed, fed, and clothed."*

Through our struggle for Independence, irrespective of the divergent opinions on other issues the concern for the betterment of the

*"My Socialism" by M.K. Gandhi, complied by R.K. Prabhu, Navajivan Publishing House, Ahmedabad. page 23.

poor of this country who form the vast majority remained our fundamental goal. Whether it was, the attainment of dominion status or complete independence, that was conceived only as a means to an end, namely, the betterment of the conditions of the poor. Independence had no meaning at any time denuded of its purpose of solving the problems of the poor. Therefore, when the fathers of the Constitution framed the Constitution, they put that in the preamble in these words ·

"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens :

JUSTICE, social, economic and political ;

LIBERTY of thought, expression, belief, faith and worship ;

EQUALITY of status and of opportunity, and to promote among them all.

FRATERNITY assuring the dignity of the individual and the unity of the Nation. "

In the Constituent Assembly, Jawaharlal Nehru stated :

"The service of India means the service of the millions who suffer, it means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every

tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over."

Granville Austin in his book "Extracts from the Indian Constitution : Cornerstone of a Nation", after quoting the above words of Jawaharlal Nehru has stated :

"Two revolutions, the national and the social, had been running parallel in India since the end of the First World War. With Independence, the national revolution would be completed, but the social revolution must go on. Freedom was not an end in itself. Only a means to an end', Nehru had said, 'that end being the raising of the people.....to higher levels and hence the general advancement of humanity.' '

K. Santhanam envisaged the Indian Revolution in three aspects, the political revolution which would end with the achievement of Independence ; the social revolution which would take the Indian people out of medievalism based on birth, religion, custom and caste ; and economic revolution, which would result in "the transition from primitive rural economy to scientific and planned agriculture and industry." He observed :

"The choice for India is between rapid evolution and violent revolution.....because

the Indian masses cannot and will not wait for a long time to obtain the satisfaction of their minimum needs."

Pandit Nehru believed that India's survival depended on the achievement of this social and economic revolution. He said : "If one cannot solve this problem soon, all our paper Constitution will become useless and purposeless".*

It is worthwhile to note that some of the provisions at present contained in the Fundamental Rights Chapter and the Directive Principles were prion to the framing of the Constitution considered to be equally fundamental which a free Constitution should contain. There was no distinction made in the beginning and the Sapru Committee found it difficult to make such a distinction. Actually he felt this question and the question of justiciable and non-justiciable rights to the Constitution-making body.

Even as late as January 22, 1947, the objective resolution of the Constituent Assembly contained the following : ....."shall be guarnteed and secured to all the people of India justice, social, economic and political, equality of status, of opportunity and before

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*"Constituent Assembly Debates" Vol. II p. 316

the law : freedom of thought, expression, belief, faith, worship, vocation, association and action subject to law and public morality and wherein adequate safeguards would be provided for minorities, backward and tribal areas and depressed and other similar classes."

It will be seen from the above that nobody including the Constitution-makers treated the rights now included in the Fundamental Rights Chapter as sacred rights in the sense Mr. Palkivala asserts them to be. As K.S. Hegde, former Judge of the Supreme Court, puts it :

"The Fundamental Rights incorporated in Part III and the Directive Principles in Part IV form an organic unit. They were divided into two parts for the sake of convenience, because, it was thought that the Directive Principles by their very nature cannot be made justiciable through courts. It was not easy for the framers of the Constitution to classify certain rights as Fundamental Rights and others as Directive Principles. The Sapru Committee, as noticed earlier, found the task difficult and left the same to the Constitution-making body. At one stage the Constitution Assembly placed the duty of the State to provide compulsory primary education to its citizens in Part III and the pro vision relating to equality in Part IV. This illustrates the difficulty in drawing the line

between the Fundamental Rights and the Directive Principles. Broadly speaking we may say, that Part III of the Constitution deals with the area of individual freedom and the extent to which state can restrain the freedom and Part IV deals with the positive duties cast upon the State to attain the ideal set out in the preamble to the Constitution."*

It has been already stated that the Constitution makers arrived at a compromise between the various conflicting claims of the propertied class and the have-nots. This conflict is brought to focus by Sir Ivor Jennings when he said :

"Essentially the Indian Constitution is an individualistic document. Its prophets are Burke, Mill and Dicey; yet some at least of the members of the Constituent Assembly thought in collectivist terms. The result is a curious dichotomy. On the one hand, the individualism of the nineteenth century has sought to limit the powers of government in the interests of liberty ; on the othcr hand the collectivism of the twentieth century has sought to expand the powers of Government in order that the State may regulate economic life and

* "Characteristics of the Constitution." by Sir Ivor Jennings and quoted by K. S. Hegde : "Directive Principles of State Policy" pp. 45.

incidentally restrict liberty. In such conditions, compromise and complexity were inevitable."*

Discussing relative priority of the Fundamental Rights and Directive Principles, Shri Hegde stases :

"The close association between political freedom and social justice has become a common concept since the French Revolution. Since the end of the First world war ; it was increasingly recognised that peace in the world can be established only if it is based on social justice. The most modern Constitution contains declaration of social and economic principles, which emphasise, among other things, the duty of the State to strive for social security and to provide work, education and proper condition of employment for its citizens."**

He further states :

"What Gandhiji has taught us is the theme of social responsibility. Often an over-emphasis on an individual right stems from the identification of democracy with the rights of the individual. But real democracy can be built only on the economic and social responsibility

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* *Ibid.*

** "Directive Principles of State Policy" by K.S. Hegde p. 45.

of all its citizens and its success would depend on the sincerity with which social amelioration and economic uplift are carried out."*

After examining the various political theories and legal concepts, K. S. Hegde comes to the following conclusion :

"From the analysis of the function of law and State it is clearly seen that it is the solemn duty of a welfare state for its very existence, the well-being and progress of the people to strive for the establishment of an egalitarian society wherein economic, social and political equality and justice prevail. In the final analyis, a Constitution draws its strength from the support it receives from the public. The sanction behind the Constitution is primarily puplic opinion".**

From the above, it is crystal clear that the Constitution containing the enumerated rights and directive principles was not intended only to be a static document for learned dissertations and lengthy discussions. It has to be transformed into a dynamic instrument for securing social justic and equality. It is with this view that those who were entrusted with the governance of this country set themselves to the task of tackling the pressing problems. This

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* *Ibid.* p. 21.

** *Ibid.* pp. 50-51

is evident from the following :

"Essentially this means that the basic criterion for determining the lines of advance must not be private profit but social gain, and that the pattern of development and the structure of socio-economic relations should be so planned that they result not only in appreciable increases in national income and employment but also in greater equality in incomes and wealth. Major decisions regarding production, distribution consumption and investment—and in fact all significant socio-economic relationships must be made by agencies informed by social purpose. The benefits of economic development must accrue more and more to the relatively less privlieged classes of society, and there should be a progressive reduction of the concentration of incomes, wealth and economic power. The problem is to create a milieu in which the small man who has so far had little opportunity of perceiving and participating in the immense possibilities of growth through organised effort is enabled to put in his best in the interests of a higher standard of life for himself und increased prosperty for the country."*

How urget and vital this approach was will

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* Quoted by K.S. Hegde in his book "Directive Principles of State Policy" from "The Second Five Year Plan", Planning Commission, 1957 p. 22.

Name of country	Population Mid-1972 in Millions	Gross National Product 1972 at Market Prices		Average annual growth Rate (%)			
				Population		G.N.P. Per capita	
		Amount in U.S. Dollar Millions	Per capita U.S. Dollar	1960-72	1965-72	1960-72	1965-72
China	786.44	133,700	170	1.8	1.8	2.6	2.6
India	563.49	61,940	110	2.3	2.3	1.1	1.4
U.S.S.R.	247.46	377,700	1,530	1.2	1.0	6.4	5.9
U.S.A.	208.84	1,167,420	5,590	1.2	1.0	3.0	2.0
U.K.	55.80	144,900	2,600	0.5	0.4	2.3	2.0

Source : World Bank Atlas, 1974. For People's Republic of China, the population figures are based on information provided to the World Population Conference, Bucharest, 1974 and the estimates of G.N.P. and growth rates are tentative.

be clear from the abject povery of the Indian masses as revealed by the following table :

In the discharge of the sacred duties and positive commands contained in the Constitution, the State was bound to be confronted with the claims of the privileged few armed with their property rights. This was anticipated by the Constitution-makers themselves. Sir B.N. Rau, who played a very prominent part in the framing of the Constitution has gone on record as saying that the Directive Principles of State policy ought to have primacy over fundamental rights in case of conflict; otherwise, much useful legislation would be defeated.

Mr, Palkhivala's thesis may be seen in a humorous light if one reads the following statement of Mr. H. M. Seervai (the former Advocate-General of Maharashtra and an eminent Constitutional lawyer) :

"After all, it is a little amusing that coal corporations, sugar corporations suddenly acquired a zeal for religious freedom and freedom of thought, but at the back of it lay questions of property."

Mr. Palkhivala has treated property right as the dominant right which is essential for the enjoyment of all other civil and personal rights. Starting from this premise he holds that any

infringement of property right will directly or indirectly affect every other right.

Justice Mathew has correctly summarised the actual position which emerges in the following words :

"This survey of the interpretation of the provisions guaranteeing the right to property in our Constitution shows that what was an uneasy compromise has now become an inviolate fortress of property and it amply justifies the remark of Mr. Justice Hidayatullah in Golakh Nath case that 'it was an error to place it (right to property) in that category (Fundamental Rights).' "

In constitutional jurisprudence, property rights instead of being considered as the foundation of all other rights, as Mr. Palkhivala does, have always been put at a lower level and degree and quality than the other civil rights. This is evident from Justice Mathew's following observations :*

"Hidayatullah J. said in Golak Nath's case that the right to property embodied in Part III is the weakest of the Fundamental Rights. This means that even among Fundamental Rights, there is a hierarchy. The concept of double standards or preferred freedoms had been

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* 1970 KLT 723

evolved in American Judicial review* to give effect to this scale of values. Basically the concept means in the context nothing but that in exercising the power to review legislation which touches the rights guaranteed in Part III, the Judge should not give equal weight to all the Fundamental Rights, that generally personal rights will be preferred to property rights, and that an alleged infringement of personal right should be weighed in the scale of bullionist by courts, whereas an alleged infringement of property right need be weighed in that of a butcher.

The great American jurist, Justice Frankfurter has observed as follows** :

"Those liberties of an individual which history has attested as the indispensable conditions of an open as against a closed society come to this court with a momentum for respect, lacking when appeal is made to libertites which derive merely from shifting economic arrangements."

Even regarding private property itself, classification has been made which emphasises the comparative importanee of different types of property. Professor Ginsberg brings this out

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* 336 US 77, 95 also see 304 US 144, 152

** 337 U.S. 77 at 25

very clearly when he says* :

"The root of the difficulty.....is that in most of the discussions the notion of private property is used too vaguely. It is necessary to distinguish at least three forms of private property : (1) property in durable and non-durable consumers' goods; (ii) property in the means of production worked by their owners; and (iii) property directly managed by their owners, especially the accumulation of masses of property of this kind in the hands of relatively narrow class. *While the first two forms of property can be justified as necessary conditions of a free and purposeful life, the third can not.* Far this type of property gives power not only over things, but through things over persons. It is open to the charge made by socialists again and again that any form of property which gives man power over man is not an instrument of freedom but of servitude."

It is regarding the third type of property mentioned above that controversies of constitutional nature have mostly arisen. That type of property, while owned and controlled by a microscopic minority, not only exerts power over other individuals but also operates in a way which brings about confrontation in a

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* See "Justice in Society" page 101 by Morris Ginsberg.

large sector of State activities and social welfare policies and programmes. Exploitation of natural resources and labour monopolistic activities and domination in the field of trade, commerce and industry are some of the features of that type of property rights. It is, therefore, obvious that conflicts are bound to arise not only between the rights of the rich minority whose sole purpose in life is the acquisition of power and profits on the one hand and the economic and even the civil rights of the individuals constituting the poor majority as well as with the State on the other. Attempts have always been made to assert the sanctity of property rights of the rich—the poor having no property worth mentioning—and to inflate the primacy of those rights in absolute terms.

The position is well summarised in the judgement of Justice Mathew* of the Supreme Court in *Keshvananda Bharati Vs. State of Kerala :*

"Owing to the complexity of social relations,

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* (1973) "S.C.R. Supplement" p. 1 at p. 820. This case deals with the Twenty-fourth, Twenty-fifth and Twenty-ninth Constitutional Amendments. The Judgement was heard by the 13 Judges of the Supreme Court and the Judgement was delivered on April 24, 1973, after the Court heard arguments for about six months.

rights founded on one set of relations may conflict with rights founded on other relations. It is obvious that human reason has become aware not only of the rights of man as a human and civil person but also of his social and economic rights. For instance, the right of worker to a just wage that is sufficient to secure his family's living or the right to unemployment relief or unemployment insurance, sick benefits, social security and other just amenities, in short, all those moral rights which are envisaged in Part IV of the Constitution.

"But there was a natural tendency to inflate and make absolute, unrestricted in every respect, the familiar Fundamental Rights, at the expense of other rights which should counterbalance them. The economic and social rights of man were never recognised in actual fact without having had to struggle against and overcome the bitter opposition of the Fundamental Rights. This was the story of the right to a just wage and similar rights in the face of the right to free mutual agreement and right to private ownership.

"To determine what is finally right involves a balancing of different claims. From an ethical point of view, all one can say is that particular rights are subject to modification in a given situation by the claims arising out of other

rights or of the body of rights as a whole. Since no single right whether natural or not is absolute, claims based on any one right may be subject to qualifications in accordance with claims based on other rights or the requirements of the total order or way of life, namely, the principle of the common good.*

"The framers of our Constitution realised that the Fundamental Rights, like natural rights, were not absolute and it was because of this that they provided for restrictions being imposed upon the exercise of these rights by law. But it was impossible for them, or for that matter, for any person, however gifted they or he might be, to foresee the type of restrictions which would be necessary to meet the changing needs of a society. Even men with the most prophetic vision could not have foreseen all the developments of the body politic in the future and the type of restrictions necessary upon the Fundamental Rights to meet them.

"The question whether a particular Fundamental Right should be taken away or abridged for the common good of the society must be decided in the light of the experience of each generation and not by what was said or laid down at the time of the framing of the Consti-

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* See "Justice in Society", by Morris Ginsberg, p. 77.

tution. It would be asking the impossible to expect one generation to plan a government that would pass through all the revolutionary changes in every aspect of life."

He further states :

"I think there are rights which inhere in human beings because they are human beings. Whether you call them natural rights or some other appellation is immaterial. As the preamble indicates, it was to secure the basic human rights like liberty and equality that the people gave unto themselves the Constitution and these basic rights are an essential feature of the Constitution; the Constitution was also enacted by the people to secure justice, politi-cal, social and economic.

"Therefore, the moral rights embodied in Part IV of the Constitution are equally an essential feature of it, the only difference being that the moral rights embodied in Part IV are not specifically enforceable as against the State by a citizen in a Court of law in case the State fails to implement its duty but, neverthe-less, they are fundamental in the governance of the country and all the organs of the State, including the judiciary, are bound to enforce those directives.

"The Fundamental Rights themselves have no fixed content; most of them are mere empty

vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment, and even abrogation of these rights in circumstances not visualized by the Constitution-makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history the nation by the moral claims embodied in Part IV.

"Whether at a particular moment in the history of the nation, a particular Fundamental Right should have priority over the moral claims embodied in Part IV or must yield to them is a matter which must be left to be decided by each generation in the light of its experience and its values.

"And, if Parliament, in its capacity as the Amending Body, decides to amend the Constitution in such a way as to take away or abridge a Fundamental Right to give priority value to the moral claims embodied in Part IV of the Constitution, the Court cannot adjudge the constitutional amendment as bad for the reason that what was intended to be subsidiary by the Constitution-makers has been made dominant. Judicial review of a constitutional amendment for the reason that it gives priority value to the moral claims embodied in Part IV over the

Fundamental Rights embodied in Part III is impermissible.

"Taking for granted that by and large the the Fundamental Rights are the extensions, permutations and combinations of natural rights in the sense explained in this judgment, it does not follow that there is any inherent limitation by virtue of their origin or character in their being taken away or abridged for the common good. The source from which these rights derive their moral sanction and transcedental character, namely, the natural law, itself recognizes that natural rights are only *prima facie* rights liable to be taken away or limited in special circumstances for securing higher values in a society or for its common good.

"But the responsibility of the Parliament in taking away or abridging a Fundamental Right is an awesome one and whenever a question of constitutional amendment which will have the above effect comes up for consideration, Parliament must be aware that they are the guardians of the rights and liberties of the people in a greater degree than the courts, as the courts cannot go into the validity of the amendment on any substantive ground."*

One of the main attacks by Mr. Palkhivala

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* *Ibid* p. 835-36.

against the Twenty-fifth Amendment is that by substituting the word "amount" for the expression "compensation" the State has been empowered to confiscate anybody's property without paying any compensation at all and the rights guaranteed under Article 19(1)(a), (c) and (g) can be eroded or extinguished. In order to understand why the expression "amount" had to be substituted it is necessary to give concisely the controversy which arose and the interpretation which the Supreme Court gave in various decisions.

Even while the Constituent Assembly was debating the expression "compensation" in Article 31(2), apprehensions were expressed about the immense burden which the State will have to bear if full compensation at the rate of market value was to be paid. It may be noted in this connection how often market value is inflated particularly by speculators in land.

In Delhi, for example, it is very well known that lands obtained from the Government and through Government agencies at concessional rates of Rs. 25 to 30 per square yard have been sold after a few years at the rate of Rs. 100 to Rs. 300 or more. Often it happens that due to various factors which have nothing to do with the labour or efforts put by the owner

and without any correlation to the question of reasonable returns for the capital invested market value has sky-rocketed. Some times value has increased because the Government itself has spent enormous amounts for development of the concerned areas and for providing amenities.

In these circumstances, it will be a perversity of justice and equity to insist on the payment of such artificial and unjust market value. Serious doubts were expressed that if the quantum of compensation was left to be decided by the courts, the State will be asked to pay full compensation at market value.

This is evident from Pandit Nehru's statement in the Constituent Assembly* :

"...Eminent lawyers have told us that on a proper construction of this clause, normally speaking, the judiciary should not and does not come in. Parliament fixes either the compensation itself or the principles governing that compensation and they should not be challenged except for one reason, where it is thought that there has been a gross abuse of the law, where in fact there has been a fraud on the Constitution".

The first relevant case regarding the inter-

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* "Constituent Assembly Debates" : Volume IX p. 1193.

pretation of Article 31(2) which came up before the Supreme Court was that of the *State of West Bengal vs. Bela Banerjee.** In this case the Supreme Court decided that the property owner must be given "a just equivalent" of what he has been deprived of. In essence and effect this meant payment of market value. The Parliament was very much agitated over this decision because its apprehensions came to be true within such a short time.

Consequently, the Constitution (Fourth) Amendment was passed which came into effect on April 27, 1955. By this amendment the following words were introduced in Article 31(2) "and no such law shall be called into question in any court on the ground that the compensation provided by the law is not adequate". It was hoped by the clear indication of the will and intention of the Parliament the mischief has been eliminated but that hope was shattered very soon by *Vajravelu Mudaliar vs. Deputy Collector.*** Instead of giving effect to the Parliamentary will and intent Justice Subba Rao by a perverse logic came to the conclusion that the Parliament has accepted the meaning given by the Supreme Court in

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* (1954) S.C.R. p. 558
** (1965) 1 S.C.R. p. 614

Bela Banerjee's case and that the law of acquisition or requisition shall provide for a "just equivalent" of what the owner has been deprived. Justice Subba Rao again repeated this performance in *Union of India vs. Metal Corporation.** But good sense prevailed in the *State of Gujarat vs. Shanti Lal Mangaldas*** which over-ruled the decision in the Metal Corporation Case.

In Shantilal's case Justice Shah held :

"In our view, Article 31(2) as amended is clear in its purport. If what is fixed or is determined by the application of specified principles is compensation for compulsory acquisition of property, the Courts cannot be invited to determine whether it is a just equivalent of the value of the property expropriated. In P. Vajravelu Mudaliar's Case, the Court held that the principles laid down by the impugned statute were not open to question. That was sufficient for the purpose of the decision of the case and the other observations were not necessary for deciding that case, and cannot be regarded as a binding decision."

This was not the end of the matter. In the

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* (1967) 1 S.C.R. p. 255
** (1969) 3 S.C.R. p. 341 at 368

Bank Nationalisation Case,* the majority executed a somersault and took a retrograde step. Justice Shah who had over-ruled the judgement in the Metal Corporation case in Shantilal's case, sang the old song again in the Bank Nationalisation Case and held that the expression compensation meant "the equivalent in terms of money of the property compulsarily acquired.**

In view of the decision in the Bank Nationalisation case and the indefiniteness created by the various other decisions as well regarding the interpretation of the expression "compensation" in Article 31(2) and by reason of the impossibility of the State to pay full "compensation" in the sense the Supreme Court meant in the Bank Nationalisation Case and other cases cited above and because of the fact as already stated that there is no legal or equitable justification to insist upon payment at the rate of market value, the Parliament found it necessary to delete the word "compensation" which led to all this legal quibbling and defeated the intent and purpose of the Constitution-makers. The neutral word "amount" was substituted."

It is hoped that by some tortuous process of

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* *R. C. Cooper Vs. Union of India* (1970) 3SCR p. 530.

** *Ibid* p. 530.

reasoning, the Supreme Court will not return "to just equivalent" and restore by the back-door payment of market value and jurisdiction of the courts to adjudicate on the adequacy of compensation and defeat again the will of the people as expressed through the Parliament.

The following will show how beneficial the Bank Nationalisation has proved to be. Organised banking has existed in this country for almost the last one and a half centuries. Before the 14 scheduled banks were nationalised in 1969, the private Banking industry catered mainly to the rich and big industries and businessmen. Credit facilities essential for economic betterment of the poor and middle classes and small-scale industries were practically non-available.

After the nationalisation of the banks in the short period of five years big strides have been taken. The annual deposits which were about Rs. 4,500 crores before 1969 have now risen to over Rs. 10,000 crores.

The number of bank branches which were previously mostly confined to urban areas have now spread to the village level. In 1969, there were about 8,000 branches and now the number has increased to 16,000 spreading all over the country and the bulk of the new expansion has been in the rural areas or semi-

urban areas. This has helped to great extent the increase in deposits.

The Government have been making consistent efforts to persuade the management of nationalised banks to have more comprehensive and beneficial schemes and activities in the rural and semi-urban areas.

In the field of credits also, the performance of the nationalised banks has shown very satisfactory results. Before nationalisation the small borrowers had only 2,16,000 accounts. Now small accounts like loan accounts of small farmers, petty businessmen, small traders, artisan, taxi and scooter drivers, rickshaw pullers, cartmen, students, professionals and young entrepreneurs have almost reached the 20,00,000 mark.

Before nationalisation less than Rs. 200 crores only were advanced to the poorer sections. After nationalisation advances to them have risen over Rs. 1,000 crores per year. The profits of the nationalised banks are now showing improvement.

The scheme of differential rates, i.e. lower leading rates to the poorer sections and higher leading rates to the upper classes is proving very beneficial to a large number of small borrowers.

Mr. Palkhivala's objections raised in his

book regarding Article 31C are the very same he had very vehemently canvassed before the Supreme Court in the Keshvanand Bharati's case.

Article 31C which was introduced by the Twenty-fifth Amendment is as follows :

"31C *Saving of laws giving effect to certain Directive Principles.* Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistant with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law cotaining a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy;

"Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

After examining the various weighty arguments for and against Mr. Palkhivala's submissions, Cheif Justice Ray* came to the

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* (1973) Supplement S.C.R. p. 1 at pp. 451-52

following conclusions :

"The declaration mentioned in Article 31C is for giving effect to the policy of the State towards securing the principles in Article 39(b) or (c). Such a declaration in a law shall not be called in question on the ground that it does not give effect to such policy. The laws which receive protection under Article 31C are laws for securing the Directive Principles of Article 39(b) and (c). The nexus or connection between the law and the objectives set out in Article 39(b) and (c) is a condition precedent for the applicability of Article 31C. On behalf of the Union and the State it was not contended that whether there was such nexus or not was justiciable. The real reason for making the declaration free from question in a court of law on the ground that it does not give effect to such policy is to leave legislative policy and wisdom to the legislature. The legislative measure might not, according to some views, give effect to Directive Principles. Therefore, legislatures are left in charge of formulating their policy and giving effect to it through legislation. It is the assessment and judgment of such measures which is sought to be excluded from judicial review by the declaration."

Like Cheif Justice Ray and Justice Mathew, Justice Chandrachud has also expressed the real

issues involved in the following words :

"The Preamble of our Constitution recites that the aim of the Constitution is to constitute India into a Sovereign Democratic Republic and to secure to 'all its citizens' Justice—social economic and political—liberty and equality. Fundamental Rights which are conferred and guaranteed by Part III of the Constitution undoubtedly constitute the arch of the Constitution and without them a man's reach will not exceed his grasp. But it cannot be overstressed that the Directive Principles of State Policy are fundamental in the governance of the country. What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual. That one is justiciable and the other not may show the intrinsic difficulties in making the latter enforceable through legal processes but that distinction does not bear on their relative importance.

"An equal right of men and women to an adequate means of livelihood; the right to obtain humane canditions of work ensuring a decent standard of life and full enjoyment of leisure; and raising the level of health and nutrition are not matters for compliance with the Writ of a Court.

"As I look at the provisions of Parts III

and IV, I feel no doubt that the basic object of conferring freedoms on individuals is the ultimate achievement of the ideals set out in Part IV. A circumspect use of the freedoms guaranteed by Part III is bound to subserve the common good but voluntary submissions to restraints is a philosopher's dream. Therefore, Article 37 enjoins the State to apply the Directive Principles in making laws. The freedom of a few have then to be abridged in order to ensure the freedom of all. It is in this sense that Parts III and IV, as said by Granville Austin*, together constitute "the conscience of the Constitution." The nation stands to-day at the cross-roads of history and exchanging the time-honoured place of the phrase, may I say that the Directive Principles of State Policy should not be permitted to become "a mere rope of sand." If the State fails to create conditions in which the Fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it."†

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* "The Indian Constitution : A Cornerstone of a Nation," Edn. 1966

† *Ibid* pp. 990-992.

The majority of the judges held the first part of Article 31C valid; Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud, JJ. holding the entire Article valid whereas Khanna and Reddy, JJ. holding the first part valid but the second part invalid. Sikri, C.J., Shelat, Hegde, Grover and Mukherjea, J.J. held the entire Article 31C invalid.

It may be recalled that the validity of the First Amendment which introduced Article 31A was upheld by this Court as long ago as 1952 in the case of *Sankari* Prasad Vs. Union of India.* Justice Khanna holds that for the same reasons for which Article 31A was upheld, there is no reason or ground to express a differnt view about the first part of Article 31C because he found that there is no qualitative difference between Article 31A and the first part of Article 31C except that they deal with different types of property. This is clear from the following passage from his Judgement† :

"It would appear from the above that while article 31A dealt with a law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of such rights or other matters mentioned

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* (1952) S.C.R. p. 89.

† (1973) Supplement S.C.R. p. 1 at pp. 743-744

in clauses (b) to (e) of that article, Article 31C relates to the securing of the objective that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. But for the difference in subjects, the language of the first clause of Articles 31A and 31C deal with right to property. Article 31A deals with certain kinds of property and its effect is, broadly speaking, to take those kinds of property from the persons who have rights in the said property. The objective of Article 31C is to prevent concentration of wealth and means of production and to ensure the distribution of ownership and control of the material resources of the community for the common good. Article 31C is thus essentially an extension of the principle which was accepted in Article 31A. The fact that the provisions of Article 31C are more comprehensive and have greater width compared to those of Article 31A would not make any material difference. Likewise, the fact that Article 31A deals with law providing for certain subjects, while Article 31C deals with law giving effect to the policy towards securing the principles specified in clause (b) or clause (c)

of Article 39, would not detract from the conclusion that Article 31C is an extension of the principle which was accepted in Article 31A. Indeed, the legislature in making a law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39 acts upon the mandate cantained in Article 37, according to which the Directive Principles are fundamental in the governance of the country and it shall be the duty of the State to apply those principles in making laws."

Mr. Palkhivala has expressed great concern and apprehension that the enormous power conferred by Article 31C may be abused and in that article there is "a built-in mechanism for the dissolution of the true democracy that India has been so far, cessation of the rule of law and possible disintegration of the nation." It is a well accepted principle that the mere possibility of abuse of power is no ground for declaring a law invalid particularly when such power is vested with the Legislature and not in some officer of the State. If there is an actual abuse of power in a particular case the remedy is to resort to Courts of Law which are entrusted with the efficacious power of judicial review. Further in cases where the judicial review powers are not adequate to provide appro-

priate reliefs and the Legislatures ride roughshod there is the ultimate sanction of public opinion and the electoral process through which the sovereign people make or unmake Legislatures and Governments. Justice Mathew has dealt with this question in the following words :

"Our Constitution, in its preamble has envisaged the establishment of a democratic sovereign republic. Democracy proceeds on the basic assumption that the representatives of the people in Parliament will reflect the will of the people and that they will not exercise their powers to betray the people or abuse the trust and confidence reposed in them by the people. Some of the great powers appertaining to the sovereignty of the State are vested in the representatives of the people. They have the power to declare war. They have power over coinage and currency. These disaster-potential powers are insulated from judicial control. These powers, if they are imprudently exercised can bring about consequences so extensive as to carry down with them all else we value. War and inflation have released evil forces which have destroyed liberty. If these great powers could be entrusted to the representatives of the people in the hope and confidence that they will not be abused, where is the warrant for

the assumption that a plenary power to amend will be abused ? The remedy of the people, if these powers are abused, is in the polling booth and the ballot box.

"The contention that if the power to amend Fundamental Rights in such a way as to take away or abridge them were to vest in Parliament, it would bring about the catastrophic consequences apprehended by counsel has an air of unreality when tested in the light of our experience of what has happened between 1951 when Sankari Prasad's case* recognised the power of the Parliament to amend the Fundamental Rights and 1967 when the Golak Nath Case† was decided. It should be remembered in this connection that the Parliament when it exercises its power to amend Fundamental Rights is as much the guardian of the liberties of the people as the Courts."‡

As already stated the majority of Judges in Keshvanand Bharati Case upheld the validity of the Twenty-fifth Amendment and the first part of Article 31C. It is only the second part of Article 31C which was held to be invalid. Therefore, it follows that most of Mr. Palkhi-

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* (1952) S.C.R. 89
† (1967) 2 S.C.R. 762
‡ *Ibid* pp. 812-813.

vala's apprehensions regarding the second part are now merely academic. The basic question regarding the primacy of the Directive Principles has been established. The vague line of thought prevalent in the early days of the Constitution that Fundamental Rights are supreme and the Directive Principles are subordinate has been totally rejected in this decision. The property right has been put in its proper place and the welfare of the millions as against the interests of the rich few has been accepted as the dominant feature. The Court has rightly rejected the exaggerated claims of property. Many of the impediments created previously by Courts in the way of implementation of the Directive Principles by legislation have now been removed. A strong constitutional and legal basis for the establishment of true Democracy as against Plutocracy has been laid. This being the position, it is clear that the virulent propaganda which has been going on against the Twenty-fifth Amendment is nothing but the battle-cry of the vested interests behind the facade of Fundamental Rights and the standard which these charlatans of democracy have raised with the inscription of Fundamental Rights on it will deceive nobody. In this connection, one may recall a character in one of Peter Ustinov's plays. One adventurer

joined the Crusaders and on his banner there was the inscription "In the service of God". But he had the honesty to add, "And incidentally, to enrich myself". Since in Indian democracy slogans and banners have ultimately to be tested and backed by public opinion, it may not be quite wise for the proponents of Plutocracy to have the same degree of honesty as the character in Peter Ustinov's play.

CHAPTER V

CONSTITUTIONAL AMENDMENTS

In a short chapter, "Freedom Is In Peril", which appears to be a prelude to the second Part of the book dealing with Parliament's powers to amend the Constitution, Mr. Palkhivala discards his cheap weapon of sarcasm and suddenly bursts out into fume and fury.

Mr. Palkhiwala says : "The myth has been sedulously propagated by wily politicians that it is the Constitution which stands in the way of the nation's economic progress and the uplift of the masses. This is the greatest fraud ever perpetrated on the people. The truth of the matter is that it is the wooden-headed and dissastrous economic policies of the Government at the Centre and in the States which are truly responsible for our appalling poverty. There is not a single sound economic policy or scheme for social uplift of the masses which is in the slightest degree hampered or hindered by any of the provisions of the Constitution. Yet the miseries of the people, which are the consequence of the incompetence or corruption, or both, of politicians in power, are placed at the

door of the Constitution. This misrepresentation serves two purposes—first, it is intended to afford an alibi for the wrong-doers and, secondly, it enables the Government to arrogate more and more powers to itself by advocating further curbs on the rights and liberties of citizens."

With the above words, the Constitutional Pandit has been instantly transformed into a plain, political opponent of the Government.

Logic has been replaced by blind prejudices and high-sounding legal maxims and propositions have been thrown to the winds and baseless allegations and catch phrases like "wily politicians", "greatest fraud", "incompetence or corruption" have come to rule the roost. This sudden metamorphosis makes one feel the same revulsion as one would feel if a Cardinal suddenly starts talking in the vocabulary of Billingsgate market. What a fall !

No responsible politician, wily or otherwise, from the ruling party has ever said that the Constitution stands in the way of nation's economic progress and the uplift of the masses. What has been said is : If for passing essential legislations and taking vital executive actions, Constitutional Amendments are necessary they should be resorted to. This is quite different from saying that it is the Constitution which

stands in the way of the nation's economic progress. It is not the legislators and politicians of this country alone who have found it necessary to seek the amendment of the Constitution whenever occasion demands it and situations justify it. This has been done in America and other countries as well. It is not as if this position is not known to Mr. Palkhivala.

It will be shown presently why Constitutional Amendments have been made from time to time. When the various Supreme Court decisions are examined, it would appear that all the Constitutional Amendments so far made have been ultimately upheld by the Supreme Court. What is important in a democracy like ours is whether the actions of the Parliament have been tested by the constitutional process of judicial review and what is the result. If the Courts uphold the measures of the Parliament whether somebody gets angry or annoyed is absolutely immaterial and irrelevant. If so inclined, one may conjure up spectres to haunt his own imagination and work himself up into an obsessive, futile and meaningless fury. But reasonable persons will refuse to be frightened by them and will not consider them worth wasting their time and thought.

There is a character in the novel, "Jalna" (or it may be "Return to Jalna") by

Mazo de La Roche. That character is a young boy who has a special talent for working himself up into a tantrum simply by closing his eyes and reciting, "O God ! what has been done to me" or something to that effect. Mr. Palkhivala's senseless rage and unjustified attacks against the politicians and the ruling party reminds one of that boy. Mr. Palkhivala has only to utter the words "politicians", "amendments", "adult franchise", "people's representatives" to work himself up into the same kind of hysterics.

Towards the middle of that short chapter under discussion Mr. Palkhivala states, "Paradoxical as it may seem, the wealthy and the influential have less to lose by abrogation of the constitutional rights than the common man—they have more fundamental means of protecting themselves than the Fundamental Rights." It is not clear to what "fundamental means'' Mr. Palkhivala refers.

The whole basis of Mr. Palkhivala's entire book is that the Fundamental Rights are the foundations of democracy; to this nobody has any objection except to his overemphasis of the property rights and his thesis that property rights form the basis of all other civil rights. So, when Mr. Palkhivala says that the wealthy have more fundamental means of protecting

themselves than the Fundamental Rights what is in his mind must be something other than Fundamental Rights and other means beyond democratic means.

Even though Mr. Palkhivala has not cared to state clearly what these are, from the experience of history, one can make a guess. In countries like Nazy Germany and Fascist Italy and Falangist Spain, the wealthy protected themselves by abrogating the Constitution and with the help of the military juntas establishing hegemony and destroying the civil liberties and other democratic rights. These three instances clearly indicate what are the "more fundamental means of protecting themselves." If this is what is meant by Mr. Palkhivala why can't he clearly say so. If that is not what is meant by him one fails to see what else is meant and contemplated.

It should not be forgotten that the poor who constitute the vast majority have also more fundamental means to protect their rights if they are driven to the walls. It may be that one of their fundamental means is an armed insurrection which may also end in the abrogation of the Constitution. It is precisely to prevent the attack from the wealthy Right as well as the desperate extreme Left from destroying democracy and the Constitution that the Consti-

tution is made flexible through the mechanism of amendments so that it is made to function as a dynamic instrument to adjust itself to the social necessities and compulsions and to achieve the main object of the Constitution, namely, the attainment of social justice and national progress and the all-round betterment.

The theory of immutability has been put forward since the dawn of history in various fields of human knowledge and activity, such as, religion, science, law and so on, but human knowledge and experience and the facts of life and nature have time and again exposed the untenability of the theory of immutability. In the field of genetics, the thesis of immutability of genes has been proved to be fallacious. Darwin's Theory of Evolution brought a fundamental change in the theological and scientific dogmas and doctrines and the present world has been proved to be the result of constant changes caused by factors and forces of nature. Dalton's Atomic Theory, which was held to embody an immutable scientific truth, has been materially altered by recent developments in nuclear science. In the higher realms of nuclear science, the ultimate particles of an atom (that is to say, matter) itself appear to be discernable only through a mathematical formula

(a product of the mind) thereby questioning the very foundations of materialism. The geo-centric view of the universe has been replaced by helio-centric view. Einstein has tal-en us away from our prosaic three-dimensional world far into an adventurous four-dimensional one with time included. Opinions as to whether we are living in an expanding or contracting universe have varied.

Some of the basic concepts of Christianity, for example, which were considered to be immutable divine commands have undergone radical changes by new thoughts and philosophies from time to time. Even the doctrine of the Original Sin is not universally accepted now. Dogmas have been questioned and basic assumptions, which were considered to be fundamental, are challenged and dissents continue to be expressed. It has been said that, but for the dissents of St. Augustine, Luther, Calvin, Loyola and Pascal, Christian religion and philosophy would have remained much poorer.

Political theories also have similarly changed with the passage of time. These theories at one time were considered immutable, absolute and good for all time to come. The Divine Right of Kings gave place to the democratic rights of the people. Kantian imperatives and Hegelian absolutes are no more serious political thoughts.

Regarding law, the concepts about its origin, role and function have also undergone radical changes. While, at one time, law was thought to be a divine command, subsequently, it was considered as originating in "social contract". While the functions of the State and the law were thought to be beneficial by the Benthamites and were to be exercised by positive legislation for the common good, the Marxists consider the law and the State to be instruments of oppression and exploitation in the hands of the ruling class. So, it is obvious that the concept of law as divine command has travelled a very long way to reach its present position as an oppressive instrument.

In the face of these cataclysmic changes which have been taking place in human ideas, knowledge, beliefs and institutions from the very dawn of human history and civilization — and change being the indispensable essence and driving force of human progress—to assert that a Constitution or a body of laws evolved at a particular point of a nation's history and the special circumstances and necessities at that time is immutable and shall continue till the end of the world is to make a mockery of history and human experience.

It is a well accepted principle in law that legal relationship entered into by individuals

or by nations based upon certain existing facts and assumptions cease to have validity when those basic facts and assumptions change. In municipal law there is the "doctrine of frustration". In international law this principle is covered by the expression *rebus sic stantibus*, that is to say, when the basis on which international treaties have been entered into have changed, the treaties are considered to be no longer binding. If, in the matter of private contracts and international treaties, this is the principle which prevails it is not reasonable to state that a law or constitution drawn up under the special circumstances and conditions and necessities by one generation will remain immutable and will bind all future generations until eternity. It has been said that when human institutions continue to be incapable of adapting to the changing circumstances and social compulsions and content become secondary and form primary, they become decadent. If they do not march forward and remain static, events will overtake them and sweep them away. If there are no in-built mechanisms for necessary changes and to react and adjust to the social, economic and political stimuli the very institutions will be over-run and be destroyed by violent revolutions. Peaceful change is the essence of democracy. Violent changes brought

about by armed insurrections are alien to the concept of democracy. One holds the view that constitutions and laws should be amenable to changes for two reasons : change is necessary for progress; and refusal to change would lead to violent revolution and the ultimate destruction of democracy itself. Those who assert to the contrary though they speak in the phraseology of democracy are either unwittingly pleading for the destruction of democracy or deliberately wishing for the same.

The above idea has been put with his characteristic clarity by Gajendragadkar, C.J. as he then was, in *Sajjan Singh vs. the State of Rajasthan* :

"The Constitution is an organic document and it is intended to serve as a guide to the solution of changing problems which the Court may have to face from time to time. Naturally, in a progressive and dynamic society the shape and appearance of these problems are bound to change with the inevitable consequence that the relevant words used in the Constitution may also change their meaning and significance. That is what makes the task of dealing with constitutional problems dynamic rather than static."*

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* (1965) I.S.C.R. p. 932 at p. 948.

"The Constitution-makers must have anticipated that in dealing with socio-economic problems which the legislatures may have to face from time to time, the concepts of public interest and other important considerations which are the basis of clauses (2) to (6),* may change and may even expand; and so, it is legitimate to assume that the Constitution-makers knew that Parliament should be competent to make amendments in these rights so as to meet the challenge of the problems which may arise in the course of socio-economic progress and development of the country. That is why we think that, even on principle, it would not be reasonable to proceed on the basis that the fundamental rights enshrined in Part III were intended to be finally and immutably settled and determined once for all and were beyond the reach of any future amendment."†

Earl Warren Burger, formerly Chief Justice of United States, has expressed the same view : "Neither the laws nor the Constitution is too sacred to change—the Constitution has been changing many times—and the decision of Judges are not holy writs". During the discussion in the Constituent Assembly, Dr. Ambedkar quotes Jafferson's following words :

* Of Article 19 of the Constitution.

† Ibid p. 954.

"We may consider each generation as a distinct nation with a right by the will of the majority to bind themselves but not to bind the succeeding generation any more than the inhabitants of another country."

Thomas Paine, in his book "The Rights of Man" observes :

"Every age and generation must be as free to act for itself, in all cases, as ages and generations which preceded it. The vanity and the presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies."

"...every generation is and must be competent to all purposes which its occasions require; it is the living and not the dead that ought to be accommodated. When man ceases to be, his power and his wants cease with him ; and having no longer any participation in the concerns of this world, he is no longer in authority in directing who shall be its governors or how its Government shall be organised or how administered."

Woodrow Wilson in his book quoted Edmund Burke who had said that "every generation sets before itself some favourite objects which it pursues as the very substance of liberty and happiness. The ideals of liberty cannot be fixed from generation to generation; only, its

conception can be, the large image of what it is. Liberty fixed in unalterable law would be no liberty at all. Government is a part of life, it must change, alike in its objects and in its practices, only this principle must remain unaltered—this principle of liberty, that there must be the freest right and opportunity of adjustment. Political liberty consists in the best practicable adjustment between the power of the Government and the privilege of the individual; and the freedom to alter the adjustment is as important as the adjustment itself for the ease and progress of affairs and the contentment of the citizen."*

"An unamendable Constitution", according to Mulford, "is the worst tyranny. It places the sceptre over a free people in the hands of dead men, and the only office left to the people is to build thrones out of the stones of their sepulchres."†

Justice Palekar has discussed the possibility of violent revolutions if a Constitution is held immutable and unamendable. He has this to say in the case‡ of *Kesavanand Bharati vs. State*

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* See "Constitutional Government in the United States" by Woodrow Wilson, pp. 4-6.

† Quoted by J.W. Garner: "Political Science and Government" pp. 537-538.

‡ (1973) Supplement S.C.R. p. 1 at pp. 571-572.

of Kerala :

"The *raison d'etre* for making provisions for the amendment of the constitution is the need for orderly change. Indeed no constitution is safe against violent extra-constitutional upheavals. But the object of making such a provision in a constitution is to discourage such upheavals and provide for orderly change in accordance with the constitution. On this, all the text-books and authorities are unanimous. Those who frame a constitution naturally want it to endure but, however gifted they may be, they may not be able to project into the future, when, owing to internal or external pressures or the social, economic and political changes in the country, alterations would be necessary in the constitutional instrument responding all the time to the will of the people in changed conditions. Only thus, an orderly change is ensured. If such a change of constitution is not made possible, there is great danger of the constitution being overtaken by forces which could not be controlled by the instruments of power created under the constitution. Widespread popular revolt directed against the extreme rigidity of a constitution is triggered not by minor issues but by major issues. People revolt not because the so called 'unessential' parts of a constitution are not

changed but because the 'essential' parts are not changed. The essential parts are regarded as astumbling block in their progress to inform. It is, therefore, evident that if for any reason, whether it is the extreme rigidity of a constitution or the disinclination of those who are in power to introduce change by amendment, the essential parts looked upon with distrust by the people are not amended, the constitution has hardly a chance to survive against the will of the people. If the constitution is to endure it must necessarily respond to the will of the people by incorporating changes sought by the people."

It is relevant to quote Jawaharlal Nehru's speech in support of the First Amendment :

"It is of the utmost importance that people should realise that this great Constitution of ours, over which we laboured for so long, is not a final and rigid thing, which must either be accepted or broken. A Constitution which is responsive to the people's will, which is responsive to their ideas, in that it can be varied here and there, they will respect it all the more and they will not fight against, when we want to change it. Otherwise, if you make them feel that it is unchangeable and cannot be touched, the only thing to be done by those who wish to change it is to try to break it. That is a

dangerous thing and a bad thing. Therefore, it is a desirable and a good thing for people to realise that this very fine Constitution that we have fashioned after years of labour is good in so far as it goes but as society changes, as conditions change, we amend it in the proper way. It is not like the unalterable law of the Medes and the Persians that it cannot be changed, although the world around may change."*

Let us now examine the various amendments of the Constitution. The First Amendment made certain changes in Article 15 of the Constitution. This amendment was necessitated by the decision of the Supreme Court in *the State of Madras vs. Shrimathi Champakam Dorairajan*† to the effect that reservation of seats for backward classes and Scheduled Castes and Scheduled Tribes in public institutions was invalid as it would offend the Fundamental Right guaranteed under Article 29(2) of the Constitution.

As Justice Mathew states‡ :

"When this Court said that the reservation of seats for these classes offended the Fundamental Rights guaranteed under article 29(2),

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* Quoted by Justice Khanna in (1973) Supplement S.C.R. at p. 762.

† (1951) S.C.R. p. 525.

‡ (1973) Supplement S.C.R. p. 1 at pp. 821-22.

what option was left but for the Parliament to enact the Amendment, for social justice required discriminatory treatment in favour of the weaker sections of the people and in particular the Scheduled Castes and Tribes in order to promote equality. It is possible to sympathise with those who bewail the decision in the case as a 'self-inflicted wound'. But when a Bench of five Judges held so, not all the tears in the world can recall a word of what was written, but only an amendment by Parliament, since the chance of the decision being overruled was remote and problematical."

The First Amendment also amended Article 19.

This amendment was necessitated by the decision in *Romesh Thapar vs. State of Madras** wherein it was said that the disturbance of public order did not come within the expression "undermine the security of the State..." As Justice Mathew states, "when this Court held that the word 'public order' would not come within the expression "undermines the security of State", no option was left to Parliament but to make the Amendment."†

The validity of this amendment was tested

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* (1950) S.C.R. p. 594

† (1973) Supplement S.C.R. p. 822

in *Sankari Prasad vs. Union of India** and the Constitutional Bench consisting of five Judges of the Supreme Court unanimously upheld the amendment.

The Constitution Fourth Amendment was necessitated as already discussed by the decision of the Supreme Court in *West Bengal vs. Bela Banerjee.*** By this decision it was held that compensation must be "just equivalent" of what the property owner has been deprived of. By this amendment of Article 31(2) it was made absolutely clear that the Courts have no jurisdiction to determine the adequacy of compensation. In spite of this unequivocal and clear expression of the intention of the Parliament in the Metal Corporation Case† and P. Vajravelu Mudaliar Case,†† the Supreme Court came back again to the "just equivalent" formula. Even though in Shantilal Mangaldas Case‡ the Court practically overruled the above two decisions and restored the real intention of the Parliament, in the Bank Nationalisation Case‡‡

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* (1952) S.C.R. p. 89
** (1954) S.C.R. p. 558.
† (1967) 1 S.C.R. p. 255.
†† (1965) 1 S.C.R. p. 614.
‡ (1969) 3 S.C.R. p. 341.
‡‡ (1970) 3 S.C.R. p. 530.

it reverted back to the "just equivalent" concept. It is this situation which formed one of the reasons for bringing the 25th Amendment to the Canstitution by amending Article 31(2) which substituted "amount" for "compensation".

In 1951, several State Legislative measures passed for giving effect to a policy of agrarian reforms faced a serious challenge in the Courts. In order to assist the State Legislatures to give effect to their agrarian policies Articles 31A and 31B were added to the Constitution by the Constitution (First) Amendment Act along with the amendments to the other articles already referred to. Article 31B provided that "none of the acts and regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void or ever to have become void." Further in 1955 by the Constitution (Fourth) Amendment Act Article 31A was also amended along with Article 31. Notwithstanding those amendments, some legislative measures adopted by different States for giving effect to the policy of agrarian reform were successively challenged. In order to save the validity of those acts as well as of other acts which were likely to be struck down Parliament enacted the Parliament (Seventeenth) Amendment Act, 1964. In *Sajjan Singh*

*vs. the State of Rajasthan** the validity of the Seventeenth Amendment was questioned. A majority of the court, P.B. Gajendragadkar, C.J., Wanchoo and Raghbar Dayal, JJ, held the Seventeenth Amendment to be valid.

The validity of the Punjab Security of Land Tenures Act and the Mysore Land Reforms Act which were included in the Ninth Schedule to the Constitution by the Seventeenth Amendment Act as well as the validity of the Constitution (Seventeenth) Amendment Act were challenged in *Golaknath vs. the State of Punjab*† even though Sajjan Singh's Case had already upheld the validity of the Seventeenth Amendment, it was reopened and a fundamental Constitution question regarding the amending powers contained in the Constitution which had already been settled since 1951 by Sankari Prasad Case as well as Sajjan Singh Case 1964, the Supreme Court thought it necessary to reopen this long settled issue. A Special Bench of 11 Judges was constituted by Subba Rao, C.J. By a narrow majority of 6 to 5 the Seventeenth Amendment was held to be invalid.

The Twenty Fourth‡ Amendment was

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* (1965) 1 S. C.R. p. 937.

† (1967) 2 S.C.R. p. 762.

‡ See Appendix III for Articles 13 and 368 before and after amendment.

mainly intended to restore the amending power of the Parliament as was intended by the Constitution-makers and well established and well accepted by Courts for 18 years from the inception of the Constitution until the position was suddenly altered by the Golaknath Case and that too by a very narrow majorlty of 6 to 5. The validity of Twenty-Fourth Amendment along with Twenty-fifth and Twenty-ninth Amendments was challenged in the recent Kesavanand Bharati's case.*

Kesavananda Bharati's case by majority has reasserted the basic principles regarding amendment of our Constitution as laid down in Shankari Prasad and Sajjan Singh case even though they received a temporary setback by a very narrow majority in Golak Nath's case. The main points which emerge from Kesavananda Bharati's case are :

(a) There is a distinction between ordinary legislative power and constituent power;

(b) The majority view in Golak Nath's case that the word "law" in article 13(2) included amendments to the Constitution and the article operated as a limitation upon the power to amend the Constitution in article 368 is erroneous.

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* (1973) S.C.R. Supplement p. 1.

(c) The power of amendment is plenary. It includes within itself the power to add, alter or repeal the various articles of the Constitution including those relating to fundamental rights.

Even Hegde and Jaganmohan Reddy, JJ. who held the Twenty-fourth Amendment invalid also decided that the decision of the majority in Golak Nath was erroneous and should be over-ruled. It was a majority of ten Judges (Hegde, Ray, Jaganmohan Reddy, Palekar, Khanna, Mathew, Bag, Dwivedi, Mukherjea and Chandrachud) which held that the decision of the majority in Golak Nath that the word "law" in Article 13(2) included amendments to the Constitution and the article operated as a limitation upon the power to amend the Constitution in Article 368 was erroneous. By a majority of seven Judges (Ray, Palekar, Khanna, Mathew, Beg, Dwivedi and Chandrachud) it was held that the power of amendment is plenary and that it includes within itself the power to add, alter or repeal the various articles of the Constitution including those relating to the Fundamental Rights.

Analysing the above four decisions it is found that altogether 25 Judges (Hidayatullah, Sikri and Shelat JJ. were in both Golak Nath and Kesavanand Bharati cases) had the occasion to consider the basic question of the Parliament's

power to amend the Constitution. It is seen that out of these 25 Judges, 20 Judges have clearly and definitely held that the Parliament has unfettered and unlimited power to amend the Constitution. This being the position, it is astonishing that Mr. Palkhivala has the temerity to attribute fraud to politicians and accuse the Government of "providing an alibi for the wrongdoers and to arrogate more and more powers to itself by advocating further curbs on the rights and liberties of citizens." It is clear that the exercise of the amending power by the Parliament is vindicated and supported by three of the four relevant decisions of the Supreme Court and by 20 of the Judges of the Supreme Court out of the 25 who had the occasion to adjudge the question. Is it suggested that 20 eminent Judges who upheld the power of the Parliament are also guilty of fraud and other charges, brought forward, very glibly and callously, by Mr. Palkhivala ?

Mr. Palkhivala's last argument is that the basic structure of the Constitution should not be changed. In the Kesavanand Bharati's Case seven of the Judges accepted this contention but Justice Khanna definitely held that the Fundamental Rights particularly the right to property do not pertain to the basic structure and framework of the Constitution. This means

that the majority of the Judges (Khanna J. along with the other six Judges who did not accept the "basic structure theory" who held the Twenty-fourth Amendment valid) have held that property right does not pertain to the basic structure of the Constitution and is therefore liable to be amended.

There is nothing in the judgements of the six Judges who held the Twenty-fourth Amendment to be invalid as well as in Justice Khanna's judgement defining what exactly this basic structure is. Neither have they laid down any guidelines for the judiciary of the entire country or the legislature to understand what exactly it is. Is it the republican structure of the Constitution? Is it the position of the Judiciary in the Constitution? Is it the Centre-State relationship? One has to guess and ultimately it may turn out that this concept of basic structure is as variable as the Lord Chancellor's foot and is potentially mischievous in the sense that through this basic structure concept future amendments of the Constitution can be invalidated.

Mr. Palkhivala's endless apprehensions and imaginary fears extend to new spheres. On page 144 of his book, he says : "The South would be at the mercy of the North; minorities at the mercy of the majority; secularism at the mercy

of religious fanaticism; and the process of disintegration of the Republic could well begin."

Both Dwivedi and Chandrachud JJ. tried to remove this apprehension. Justice S. N. Dwivedi said :

"The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed that they can understand and appreciate it. The more they understand it, the more they love it and the more they prize it.

I do not believe that unhedged amending power would endanger the interests of the religious, linguistic and cultural minorities in the country. As long as they are prepared to enter into the political process and make combinations and permutations with others, they will not remain permanently and completely ignored or out of power. As an instance, while the Hindu Law of Succession has been amended by Parliament, no legislature from 1950 to this day has taken courage to amend the Muslim Law of Succession. A minority party has been sharing power in one State for several years. Judicial review will isolate the minorities from the main stream of the democratic process. They will lose the flexibility to form and re-form alliances with others. Their

self-confidence will disappear, and they will become as dependent on the Court's protection as they were once dependent on the Government's protection. It seems to me that a two-thirds majority in Parliament will give them better security than the close vote of this Court on an issue vitally affecting them."*

Justice Chandrachud further said :

"Counsel painted a lurid picture of the consequences which will ensue if a wide and untrammelled power is conceded to the Parliament to amend the Constitution. These consequences do not scare me. It is true that our confidence in the men of our choice cannot completely silence our fears for the safety of our rights. But in a democratic polity, people have the right to decide what they want and they can only express their will through their elected representatives in the hope and belief that the trust will not be abused. Trustees are not unknown to have committed breaches of trust but no one for that reason has abolished the institution of Trusts."†

In conclusion it may be relevant to point out the fact that when in 1971 the Congress Party went to polls for the Lok Sabha election,

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* (1973) Supplement S.C.R. P. 922
† (1973) Supplement S.C.R. p. 980.

the Party had a very comprehensive election manifesto. In paragraph 15 the following programme of action was placed before the country :

"15. The nation's progress cannot be halted. The spirit of democracy demands that the Constitution should enable the fulfilment of the needs and urges of the people. Our Constitution has earlier been amended in the interest of economic development. It will be our endeavour to seek such further constitutional remedies and amendments as are necessary to overcome the impediments in the path of social jnstice."

It is well known that the electorate of this country gave a massive mandate to the Congress Party against the expectation and forecasts of those "experts" on politics and public opinion in this country. Those who hoped for the down-fall of the Congress and for coming into power or the emergence of utter political chaos in this country were completely frustrated and disheartened. The flamboyant Grand Alliance and adjustments among its members were overwhelmingly rejected by the people of this country. Many of those who had started dreaming of power were scattered like flotsam and jetsam on the shores of their political destiny.

It is with the backing of this enormous mandate from the people that the ruling Congress Party got the Amendment Bills under discussion passed by the Parliament. In 1972, the Congress Party again appealed to the ele ctorate in the elections to the State Assemblies in Andhra Pradesh, Assam, Bihar, Delhi, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Mysore, Punjab, Rajasthan, Tripura and West Bengal. Through the election manifesto the Congress Party reported to the people what has been done in pursuance of the mandate given in 1971 regarding the constitutional amendments. The relevant paragraphs are quoted below :

"I0. By the 24th Amendment, the power of Parliament to amend any part of the Constitution has been restored. The Directive Principles enjoin that the ownership and control of the material resources of the community should be so distributed as best to subserve the common good and that the working of the economic system should not result in the concentration of wealth and means of production to the common detriment. By the 25th Amendment, these principles have been given their due position. The needs of the masses have been put above those of the privileged few.

"11. The 26th Amendment redeems the pledge to abolish Privy Purses and Princely Privileges, thereby ending an outdated and anarchronistic system".

Again the people gave their verdict approving the above steps.

Mr. Palkhivala, who has such contempt for adult franchise, politicians and the democratic methods in this country may not approve at all and may not give any weight to the massive mandate of the people but as far as the ruling party and the Government and those who believe in the democratic system are concerned this is the only method by which they can legitimately act. Perhaps, people like Mr. Palkhivala have other methods in view, one of them being conducting researches into volumes of books and constitutional manuscripts, both ancient and modern, and evolving constitutional theories and principles sitting in the cosy comfort of air-conditioned rooms and libraries. Perhaps the products of their meditation and cerebration should be accepted by all as "divine commands" without being subject to the process of "nose counting". They have arrogated to themselves the moral right to declare that amending the Constitution backed by the mandate of the people through the parliamentary process and tested and upheld by the highest Court of this

country is destruction of democracy and those who resort to this process are perpetuating a fraud. But the people of this country emphatically differ and refuse to accept these "divine commands." Though illiterate and poor they have the inherent and robust commonsense to identify their true friends and to detect the others.

It will not be out of place here in keeping the record straight to recall what happened in 1967. In a number of States, the people through the electoral process gave an opportunity to many parties to come to power. This trial of an alternative proved to be disastrous. The unholy coalitions which occupied the seats of power in various States very soon showed their true colours and their ugly fangs and claws. Infighting, unparalleled corruption and instability and lawlessness became the order of the day. The people shuddered with horror and cursed in disgust and at the earliest opportunity they threw these parties out of power and into the limbo of oblivion, and as shown above reposed their confidence again in the present ruling party. This is the way the democratic people exercise their valuable, inalienable and great democratic rights. It is futile, banal and a traversty of truth for Mr. Palkhivala to say that the people of this country are being misled and cheated by glib promises.

CHAPTER VI

AN INDEPENDENT JUDICIARY

In the chapter "A Judiciary made to Measure", Mr. Palkhivala has reproduced the oftrepeated arguments which have become by this time rather stale. One could have given a heading to the Chapter "Arguments made to Measure" but since catch-phrases do not seem to be the best medium to express valid arguments, it is avoided. Throughout this chapter and particularly in paragraph one, Mr. Palkhivala has suggested that Shelat, Hegde and Grover, JJ. were superseded simply because they decided "the monumental case against the Government". (Kesavananda Bharati's case).

If one had an aptitude for the unsavoury art of motive hunting, one could very well say that these three Judges accepted Mr. Palkhivala's arguments and decided in his favour not only in this "monumental case" but also in the other two monumental cases, namely, the Bank Nationalisation Case and the Privy Purses Case* and that is why he considers the supersession and the resignation of these three Judges as the "saddest day in the history of our

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* (1971) 3 S.C.R. 9.

free institutions". It is because of the fact that indulging in such cheap gimmicks particularly while discussing basic and fundamental questions cannot be quite right and proper that one refrains from questioning Mr. Palkhivala's or anybody else's motives.

As far as Justice Hegde is concerned, the statement that he decided against the Government has to be qualified because he decided one of the important issues in the whole controversy in favour of the Government, namely, that the decision of the majority in the Golak Nath case that the word "law" in Article 13(2) included amendments to the Constitution and the article operated as a limitation upon the power to amend the Constitution in Article 368 is erroneous and is overruled.

Speaking about the Golak Nath's case one may take the liberty of mentioning certain background materials. Everybody knows that the case was decided "against the Government" by a majority of one (6 to 5). Justice Vaidyalingam was one of the six Judges. Justice Subba Rao, CJ, had a long standing friendship with him starting from the days when they worked together in Shri Rajamannar's (former Chief Justice of Madras) Chamber. He was appointed as a Judge of the Supreme Court on the recommendation of Justice Subba Rao

who was at that time the Chief Justice of the Supreme Court. Golak Nath's case is the first case in which Justice Vaidyalingam sat as a Judge of the Supreme Court and it is with his support that the majority of one was obtained. These are facts. If one were to adopt the objectional method of Mr. Palkhivala, one could easily say that Justice Vaidyalingam was deliberately and intentionally brought over to the Supreme Court to get support to Shri Subba Rao's points of view. One does not wish to encroach upon Mr. Palkhivala's special preserve.

Mr. Palkhivala says : "In no other democracy do the ministers malign the courts regularly in public as they have been doing recently in India." The words 'democracy" and "ministers" have again sent him into hysterics. It is very easy to make such atrocious and sweeping statements particularly when one is not called upon to prove them. Will he care to mention specific instances naming the ministers and specifiying clearly when, where and what they said maligning the courts ?

From a person of Mr. Palkhivala's standing and stature one would have expected a much more responsible statement based on correct facts. Perhaps in the heat of the controversy, facts became the first victim and passsions and

assertions were all that mattered.

Mr. Palkhivala further says : "In no other democracy is there such persistent talk in the ruling party about a "committed" judiciary." Here again, one is entitled to demand facts.

Has the ruling party in this country ever passed a resolution to this effect; have any responsible leaders of the party like the Congress President and other officials of the Party made such statements? Has the Prime Minister ever said so ? If so, when and where ? Has the Cabinet or the Political Affairs Committee made such a statement? It may be an individual party man or a Minister who has used the word "committed judiciary". But, basing on it, to make an unqualified and wild statement as Mr. Palkhivala has done is a blatant perversion and distortion of facts and truth.

Before one goes further it has to be made clear that the expression "supersession" is not apt and well chosen. "Supersession" is a well-known expression, which implies that a person who had been superseded had some right or definable legal claim to be appointed to a particular post or promoted to that post and somebody having no such right has been promoted or appointed to that post overlooking the just and right claims of the person superseded. In the case of the three Judges it is

emphatically denied and contended that they had no such right or legal claim to be appointed as the Chief Justice of India.

The main objections of Mr. Palkhivala regarding the "supersession" of the three Supreme Court Judges Shelat, Hegde and Grover, JJ. and the appointment of Shri A.N. Ray, J. as the Chief Justice are the following :

(1) A constitutional convention has developed whereby the seniormost Judge of the Supreme Court is automatically appointed as the Chief Justice.

(2) The claims of these three Judges have been overlooked because these Judges were not found "suitable" from the Government's viewpoint.

(3) By overlooking their claims and appointing Shri A.N. Ray as the Chief Justice the independence of the judiciary has been destroyed or tampered with.

Regarding the question of convention, the fact is there is no such constitutional convention either in this country or in any other comparable democratic country. Shri A.R. Antulay has written a very elaborate and well documented and reasoned book* about this aspect

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* "Appointment of a Chief Justice" by A.R. Antulay (Minister of Law, Government of Maharashtra) Popular Prakashan, Bombay, 1973.

of the matter.

Under Article 124 of the Constitution, the power of appointment of the Judges of the Supreme Court including the Chief Justice has been vested with the President. Therefore, assuming that it has been the practice to appoint the seniormost Judge of the Supreme Court as the Chief Justice, it cannot give rise to a valid convention because a convention which automatically determines the appointment of the Chief Justice on the basis of seniority will necessarily negative the constitutional discretion and power vested in the President of India to make such an appointment. It is a well accepted principle that there cannot arise a valid convention against the constitutional provisions.

The fact that all the Chief Justices appointed so far happened to be the seniormost Judges does not and cannot establish a convetion against the provisions in Article 124. It may be that those senior Judges were found to be fit by the President and he, therefore, in the exercise of his constitutional power and discretion appointed them. To draw a conclusion from the above that a convention has developed whereby the seniormost Judge has acquired the right to get automatic promotion to the post of the Chief Justice is fallacious.

Actually, on two occasions in the short history of the Supreme Court the appointment of persons other than the seniormost Judge of the Supreme Court as Chief Justice was seriously contemplated. It was not done not because of any convention but because of other factors.

It is interesting to note that Shri Chagla was one of those who was thought of for appointment as Chief Justice when he was only the Chief Justice of Bombay High Court and not even a Judge of the Supreme Court let alone one the seniormost Judge. It is not on record or not even wishpered that Shri Chagla who has now come up against "supersession" ever raised at that time any objection against the proposal on the ground that it would constitute a breach of a well-established constitutional convention or on any other ground.

Shri Chagla himself was appointed as the Chief Justice of Bombay High Court "superseding" Shri K.C. Sen. This argument is sought to be met by Mr. Palkhivala in his book by the statement, "K.C. Sen was an I.C.S. officer and the then retiring Chief Justice of Bombay strongly recommended that the unbroken tradition of having only a member of the Bar as the Chief Justice of Bombay should be adhered to."

Up to this point Mr. Palkhivala's contention

was that the efficiency and capacity should be the only consideration apart from seniority which should weigh in the matter of the appointment of the Chief Justice. But, now when cornered by the instance of Shri K.C. Sen, a new criterion is discovered, namely, the strong recommendation of the retiring Chief Justice of Bombay that the unbroken tradition should be kept.

Two things have to be noted here: (1) The strong recommendation of the Chief Justice of Bombay; and (2) There was an unbroken tradition of having a Member of the Bar as the Chief Justice. As one can clearly see "the strong recommendation" as well as "the unbroken tradition" have nothing to do with the test of efficiency and capacity or seniority. It is also noteworthy that Mr. Palkhivala uses the expression "unbroken tradition" and not "a well established convention."

The three main principles, which Mr. Palkhivala has canvassed as the only criteria for the appointment of a Chief Justice have been kept in the back stage in the case of Shri K.C. Sen and new criteria are accepted for justifying the "supersession" of Shri K.C. Sen.

Either one has to come to the conclusion that there are criteria other than seniority, efficiency and capacity or that according to

Mr. Palkhivala's natural bent of mind whatever is done by an authority other than the present Government of India is correct (Shri Chagla was appointed before Independence by the British Government) and whatever is done by the present Government is atrocious and anti-democratic. The President having the constitutional power to appoint the Chief Justice unless it is shown that the power is exercised *mala fide* or for considerations other than legitimate, there is no justification in being over-critical of the appointment and crying from the housetops as if the judiciary and judicial independence have been destroyed. Mr. Palkhivala himself admits or at least does not question the ability and competence of Shri A.N. Ray to be appointed the Chief Justice and no argument other than the convention of appointing the seniormost Judge has been put forward. As already shown, his argument based on convention is totally untenable.

The only suggestion made of *mala fides* is based on the unjustified inference that the three Judges were superseded because they gave a decision against the Government in the monumental case of Kesavananda Bharati. As already stated it is a cheap gimmick and a mean trick to make such serious allegations.

In the second part of his chapter "A judi-

ciary Made to Measure" Mr. Palkhivala has mainly devoted his attention to the speech of the late Mohan Kumaramangalan in the Lok Sabha on May 2, 1973. At the very outset it has to be mentioned that by selective extracts, Mr. Palkhivala has completely distorted Mohan Kumaramangalam's speech and given an entirely untrue picture. Making this picture which is Mr. Palkhivala's own creation as starting point he has unleashed a virulent attack. Mr. Palkhivala says : "Let us consider Shri Kumaramangalam's plea that the Chief Justice must be one whose philosophy or outlook is the most suitable from the Government's viewpoint. This means that the Chief Justice should be selected on the basis of his suitability, not from the viewpoint of the Constitution and the constitutional duties and functions he has to discharge, but from the angle of the executive." What Mohan Kumaramangalam actually said was this : "Fourthly, it is entirely within the discretion of the Government of the day to appoint the person considered in its eyes as the most suitable, as having the most suitable philosophy or outlook, to occupy the highest judicial office in the country."*

It will be evident to any impartial reader

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* Lok Sabha Debates Vol. XXVII dated 2.5.73 cc. 392.

that what Mohan Kumaramangalam said and meant was that the person must have the most suitable philosophy or outlook to occupy the highest judicial office. Who is to determine the suitability ? The suitability obviously has to be determined by the Government. Under the Constitution, the President being the appointing authority—and the President acts on the advice of the Council of Ministers—there cannot be any authority other than the Government who determines the suitability. One fails to understand what is wrong with the statement and how anybody can twist this statement in the way Mr. Palkhivala has done to make it read as "the most suitable person from the Government's point of view." Mr. Palkhivala says : "In other words, what the Government really wants is that the Chief Justice should subscribe, not to the philosophy of the Constitution but to the philosophy of the ruling party."

After going through the entire speech of Mohan Kumaramangalam one fails to see where exactly he had made such a statement or suggestion. On the contrary, the only place where Mohan Kumaramangalam mentioned the word "party" he did so to stress the point that the party politics of the Judge should not be a consideration at all. This is evident from Mohan Kumaramangalam's words : "Not the

party to which he belongs but what it is that makes the man." Mohan Kumaramangalam rejected the party politics of the Judge and gave emphasis on the totality of the "man" who is to be appointed as a Judge. One fails to understand what is wrong with the statement. When Mohan Kumaramangalam definitely and clearly stated that the party politics of the Judge should not be a consideration at all, Mr. Palkhivala very boldly and coolly states just the reverse. He has also criticised Mohan Kumaramangalam's statement that the Government is "entitled to come to the conclusion that the philosophy of this Judge is forward-looking and of that Judge backward-looking and to decide that we will take the forward-looking Judge and not the backward-looking Judge."

Commenting on the statement, Mr. Palkhivala says : "This attitude towards the judiciary is typical of the Communist countries, where the judiciary has to be committed to the philosophy of the one and only party permitted to function and where the judiciary exists to "help" the Government in implementing its programmes. It is also the philosophy of dictators and absolute monarchs."

Mr. Palkhivala's statement is open to many objections. Firstly, he is absolutely wrong when he says that this attitude, namely, appoint-

ment of the Judges on political considerations is that of the Communist countries and dictators and monarchs.

In the United States the appointment of Chief Justice is invariably on political considerations. When F.D. Roosevelt appointed the "New Deal Judges", was he acting as a dictator? Or by his action, did he destroy the judiciary or independence of the judiciary in America ?

Is it not that in England the appointment of Lord Chancellor who is always a member of the ruling party and a member of the Cabinet made on political basis ? Is it not the conventional right of the Attorney-General of England who is a member of the party in power and also a Member of the Ministry to become the Chief Justice of England if he chooses so ?

If these admitted political appointments in America and England are not dictatorial or monarchic or characteristic of Communist countries how does it become dictatorial, monarchic or an attitude of a Communist country, when the Government of India only considers whether a Judge is forward-looking or backward-looking without taking at all into consideration the party affiliations of the Judge concerned. When in America and England the Chief Justices and Lord Chancellors are appointed on party considerations that is per-

fectly all right !

But, the Government of India cannot even consider whether a Judge's views are forward-looking or backward-looking ! If it does so, it is a great crime in the eye of Mr. Palkhivala. He has again and again indulged in distorting Mohan Kumaramangalam's statements. He asks : "Must a forward-looking Chief Justice "help" the Government by a favourable decision upholding the requisite amendment of the Constitution as valid ?" It would seem from this passage that Mohan Kumaramangalam had stated that the Chief Justice should help the Government to get the requisite amendment declared valid. This is sheer perversity and distortion.

After analysing the various conflicting decisions of the Supreme Court on important issues Mohan Kumaramangalam said it would be good to have a Chief Justice "who will be able to ensure stability, certainly about the state of the law, a person who could be able to give a certain continuity, a certain permanence, to the approach made by the Court to the important problems that come before it."

Where did Mohan Kumaramangalam state that the Chief Justice should help the Government to get the requisite amendments passed ? It is not as if Mr. Palkhivala's understanding

of English is so bad that he un-intentionally makes so many distortions, mis-statements and wrong statements in paraphrasing and quoting Mohan Kumaramangalam. One does not want to make any further comment. The above passages speak for themselves.

Mr. Palkhivala has suggested in a number of places that Mohan Kumaramangalam has pleaded for a "committed judiciary" and the Government wants to have such a judiciary. Mohan Kumaramangalam said : "We are denounced for wanting committed judges as though we want the judges to commit themselves. We do not want any committed judges. No judge has to commit himself." Can any statement be clearer and more unambiguous than this ? Yet not only Mr. Palkhivala but a number of others also have been going on with this canard and utter falsehood that the Government and the ruling party want "committed" Judges. Goebels must be grinning in his grave. He had such a devoted Dutch Army and knights in arms as disciples.

No Government worth the name would like to have a gutless, cringing, pro-Government judiciary. Neither would any Government like to have perpetually hostile, prejudiced, anti-Government judges who persistently overrule long-established chains of decisions without

apparant rhyme or reason abandoning without justification the well-established principles that the previous judgement of the same court should not be normally overruled. The only commitment expected of the Judges is the commitment to justice as envisaged by the Constitution—our Constitution and not an outside one—and to the objectives and aims and positive mandates of the Constitution and not to abstract theories alien to our fundamental laws, national aspirations and goals.

In the matter of the powers of the Parliament even though there were already two decisions (Sankari Prasad case and Sajjan Singh case) upholding the Parliament's powers to amend the Constitution and even though there was a decision upholding the validity of the Seventeenth Amendment in Golak Nath's Case by a narrow majority of six to five, they overruled the above decisions and destabilised the law. One can understand this if a large majority of the Bench which decided the Golak Nath case was of the opinion that the previous decisions were wrong and the voice of dissent was very feeble. As already analysed in the previous chapter, actually 20 Judges were in favour of the power of the Parliament and only a bare five were against it and it is these five Judges who unsettled the law.

One of them, Justice Subba Rao, while he was holding the office of the Chief Justice concerted with the Opposition political parties and procured support from them to contest for the Presidentship of India. In no other country has such a violation of the proprieties of this august office has taken place. That Judge and his cortege have now raised the banner of the independence of the judiciary.

Mr. Palkhivala has nothing to say about this while a person of the late M.C. Setalvad's eminence and standing condemned openly the action of Justice Subba Rao. Suppose it happened that the Congress Party concerted with a sitting Chief Justice with a view to giving him nomination to contest for the Presidentship, Mr. Palkhivala and his tribe would have raised such a scream of protests and hysteria reminding one of the earth-shaking howl let out by Cyclopes when Ulysses thrust a burning log into the giant's only eye.

It has already been discussed in detail how in the interpretation of the expression "compensation" in Article 31, some Judges persistently defeated the intention of the Parliament and even ignored the clear constitutional amendment. There are number of instances to cite but the above will suffice.

According to people of Mr. Palkhivala's thinking, virulent anti-Government attitude of the Judges is a sure indication of the independence of the Judges concerned but the moment a Judge decides anything in favour of the Government he loses his judicial independence. Independence in the real sense means neither pro-Government nor anti-Government attitudes, but objectivity and the capacity to decide without fear or favour.

Before dealing in detail with the question of the independence of the judiciary, one may make a passing remark about Mr. Palkhivala's following statement. He says: "During the hearing of the Fundamental Rights case, the Attorney-General appearing for the Union of India and the counsel for some States expressly referred in open Court, both orally and in writing, to the alternative of "political action" if the Supreme Court's rulings did not find favour with the Government."

From this passage it would appear that the Attorney-General as well as the counsel for some States threatened the Court that if the Supreme Court ruling did not find favour with the Government it would be counter, checked by political action. There cannot be worse case of suppression of truth and suggestion of falsehood than this statement of Mr. Palkhivala.

What happened was they argued that if the Constitution is incapable of adjustment to the pressing necessities of the time and the Constitution cannot be amended to meet these situations, then the only alternative would be a violent revolution.

In this connection, one should recall the warning of some of the Supreme Court Judges themselves and also of eminent constitutional authorities both inside and outside India. This being the position one fails to find sufficiently strong words to condemn the suppression of truth and suggestion of falsehood and villification of the Government and their Counsel by Mr. Palkhivala in the guise of a learned discourse on the independence of judiciary.

It has been contended that by overlooking the seniority of the three Judges and by provoking the cornered Judges to resign on not being promoted to the post of the Chief Justice of India, a new threat to judicial independence has arisen. It is difficult even to imagine how not getting the promotion to a post which one cannot claim as of right will effect the independence of anybody. Simply because one had expected something and one does not get it, it is inconceivable that he would lose his independence of views unless his moral calibre is very low indeed. To say that any Judge would lose

his independence in these circumstances would in fact amount to casting a reflection and aspersion on the independent and fearless judiciary in this country which has earned world wide admiration for these redeeming qualities.

The concepts of independence of judiciary and how it can be maintained have been well established in the democratic countries by a long and agonising process of trials and errors.

By now the direction and mechanism are well defined : "The fourth and final principle which is a basic part of the English Constitution is the independence of the judiciary. It would be inconceivable that Parliament should regard itself free to abolish the principle which has been accepted as a corner-stone of freedom ever since the Act of Settlement in 1701. It has been recognised as axiomatic that if the judiciary were placed under the authority of either the legislature or the executive branches of the Government then the administration of law might no longer have the impartiality which is essential if justice is to prevail.* The security of tenure is a primary bulwark and safeguard of judicial independence.

As observed by Chief Justice Holt : "···Men

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* A. L. Goodhart, English Law & the Moral Law 1953, p. 57

should have places not to hold precariously or determinable on will and pleasure but having certain durable estate that they might act in them without fear of losing them. We all know it and our places as judges are so settled only determinable upon misbehaviour.* It is essential that judges should be "free from fear of dismissal by the person whom they may be asked by a litigant to control."**

In England up to the beginning of the 17th century judges held office during the sovereign's pleasure. At the accession of Mary the Chief Justices were dismissed because they had tried to impede her succession. Queen Elizabeth I is suspected of dismissing a judge from political motive. But during the rest of the Tudor period there had been in practice a real measure of judicial independence and security of tenure though appointments were at pleasure.

The situation worsened and became almost intolerable during the Stuart period. The Stuart Kings used their royal powers "to dismiss judges at pleasure and appoint others to secure so far as they could a bench of royalist sympathies. For instance Sir Edward Coke's

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* 89. E.R. 680 at 734

** "Constitutional Law" : Ed. by Wade & Philips 1960, p. 308

opinion against the Crown in a Constitutional case in 1616 brought his immediate dismissal."* The Parliament and the Common Lawyers considered this practice as highly improper and objectionable. Hence during the period of Commonwealth (1649-1660) all judicial appointments were made for good behaviour.

After Restoration both Charles II and James II reverted to the unhealthy practice of appointing judges to hold office during pleasure. They resorted to dismissal of judges in order to secure favourable decisions. James II carried this ignoble practice to such an extent that all judges of ability and integrity were driven from the Bench.**

As a reaction against this Stuart practice the reform of the tenure of the judicial office took some priority in the Revolution Settlement. "William II quickly dismissed the lackeys of James II and restored the Commonwealth practice of issuing judicial commissions during good behaviour---it was only by inadvertance that such a provision had been omitted from the hastily drawn Bill of Rights."†

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* "The Independence of the Judiciary", by W.R. Lederman "Canadian Bar Review" Vol. XXXIV, p. 679 at p. 780.

** Ibid p. 781.

† Ibid. See "Constitutional History" by Taswell Langmead, 10th Edition, p. 518 for further details.

Section 3(7) of the Act of Settlement (1701) for the first time unequivocally gave statutory authority and recognition to the principle of judges holding office during good behaviour. It further provided that judges could be removed only upon the address of both Houses of Parliament.

The present position in England according to Anson, Philips and Viscount Sankey, is that theoretically a judge can be removed by four methods namely : (a) A writ (of *scire facias*) to repeal the patent by which the office has been conferred ; (b) Criminal information ; (c) Abolishing a particular judge's post by an Act of Parliament ; and (d) Impeachment.

But, Ivor Jennings is of opinion that the only method available is the last one* whatever may be the theoretical possibilities and that the present position is settled beyond doubt that the appointment is during good behaviour and a judge can be removed only by impeachment and no government will advise the Crown to remove a judge by adopting any other procedure.

From the discussion and passages quoted above, it will be clear that the primary bulwark

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* "The Law of the Constitution", by Ivor Jennings, 1952 p. 227.

for the independence of judiciary is the security of tenure, that is to say, when a person is appointed as a Judge he shall not be removed during his tenure except for misbehaviour and that too only by the duly established process of impeachment by the Parliament.

Our Constitution-makers adopted this bulwark in our Constitution. Article 124(2) of the Constitution empowers the President to appoint the Judges of the Supreme Court and those who are so appointed "shall hold office until he attains the age of 65 years." Article 124(4) states that a judge of the Supreme Court shall not be removed from his office except by an impeachment by the Parliament on the ground of misbehaviour. Articles 217(1) and 218 respectively contains corresponding provisions in the matter of the High Court Judges.

In this connection, it is necessary to refer to the controversy which arose in the case of J.P. Mitter, former Judge of the Calcutta High Court. There was some discrepancy in the matter of his age as evidenced by certain documents. Basing on a higher age contained in one of the documents Justice Mitter was asked to resign whereupon he filed a writ petition in the Calcutta High Court. A fundamental question was raised not only in the Court but also outside. It was generally felt that the Consti-

tution having fixed the retirement age and having provided that a Judge shall not be removed except by impeachment by the Parliament and that too for "misbehaviour" if the executive assumes a power to determine the age of a Judge and ask him to retire the very vital provisions of security of tenure would be defeated. In view of this controversy as well as the decision of the Supreme Court in Justice Mitter's case new Sub-Article (2A) was inserted by the Constitution (Fifteenth) Amendment Act 1956.

Article (2A) reads as under :

"The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide."

A similar sub-Article was introduced in Article 217 regarding the High Court Judges also*. In pursuance of this, detailed provisions have been made empowering the President of India to decide the matter with adequate procedural protection for Judges concerned. Most of the Constitutions proceed on the basis that once specific provision is made to safeguard the security of tenure, the parliamentary bulwark

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* Constitution (Fifteenth) Amendment Act with retrospective effect.

of the independence of judiciary is secured. But our Constitution has gone much further and provided a number of secondary bulwarks as well.

By Article 125(1 and 2) of the Constitution read with the Second Schedule the salary of a Supreme Court Judge and the privileges, allowances and rights are fixed. The proviso to that article ensures further security by providing "neither the salaries nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment." Similar provisions are contained in Article 221 regarding the High Court Judges.

When we examine the Second Schedule it is found that a Supreme Court Judge shall be entitled without payment of rent to the use of an official residence and that there are other minute details relating to travelling expenses, etc. Article 146 empowers the Chief Justice of India to appoint the officers and servants of the Supreme Court and further by Article 146 it is provided that the administrative expenses of the Supreme Court including the salaries and allowances and pension payable to the officers and servants of the Court shall be charged upon the Consolidated Fund of India.

It will, therefore, be seen that the Constitution-makers have secured the independence of judiciary not only by providing for the security of tenure but also by fixing their salaries and providing for their allowances, etc. and by empowering the Chief Justice for appointing the officers and servants of the Supreme Court. It is further stipulated that the salaries, allowances, etc. of the Supreme Court Judges shall not be varied to their disadvantage after their appointment and further still it is required that such salaries and allowances not only of the Judges but also of the officers and servants of the Supreme Court be charged upon the Consolidated Fund of India.

It is inconceivable that the Constitution-makers after having taken so much pain and gone into such minute details for ensuring the independence of the judiciary they would have overlooked the question of seniority in the appointment of the Chief Justice if that was considered to be a factor for the maintenance of the independence of the judiciary. These provisions and facts are well known to every-body and particularly to Mr. Palkhivala. In spite of that, if a jarring cocophony is raised to the effect that the independence of judiciary is affected by overlooking the seniority, one can only say the object behind such babel is not

the securing of the independence of the judiciary but it is the indulging in of anti-Government political propaganda.

Everybody is entitled in a democracy like ours to raise his or her voice and carry on propaganda against the Government. But, instead of plainly admitting that it is political propaganda that is aimed at, assuming a "holier than thou" attitude and adorning the deceptive mask of constitutional sanctity is nothing but sheer hypocrisy and that too of the garden variety.

CHAPTER VII

CONCLUSION

The title of this book has raised the question whether our Constitution is for the haves or for the have-nots. It is possible from that title to get the impression that it is meant that the Constitution is only for either of the two. From the very outset it has to be made clear that the discussion throughout the book will show that the Constitution is meant for all—both for the haves and for the have-nots. But everyone's right is however subject to the limitations contained in the Constitution and the valid laws made thereunder. While the State has to observe the negative mandates, it has to implement to the fullest the positive commands of State policy and to strive to achieve the ideals and objectives of the Constitution. Wherever it has been found that in the implementation of the positive commands, namely, the Directive Principles, laws have to be passed and Constitution amended it has been done and the Parliament's actions have been tested and upheld by the reviewing authority, namely, the judiciary from time to time. Whenever adjustments in the laws passed

have been found necessary as a result of judicial pronouncements the State has followed the judicial commands.

In the above process, there are certain democratic norms and procedures, ascertaining the will of the people and seeking their mandates through democratic elections, passing the necessary legislation by the sovereign Parliament and subjecting the State actions to strict judicial scrutiny. As already, shown, the Government and the political party in power have always diligently and scrupulously observed these.

Having done this, if some persons having no respect or belief in the very democratic institutions because they find that these do not fit in with their assertions, reasoning, theories and wishful thinking, it is absolutely impossible to change the course of events just to please them at the risk of jeopardising the welfare of the nation and the future of the Indian society.

They may rave and rant but the relentless forces of Indian society, politics and economics will march along the sacred path towards the national goal of "the good of the people" which is "the supremest law."

In fulfilling the historic duties entrusted to the ruling party and the Government by the

people the declarations, assertions and allegations which have no foundation or justification whatsoever will not be allowed to retard or prevent the attainment of the set and sacred goals of democracy, secularism and socialism.

Baseless allegations that the ruling party and the Government are out to destroy property rights, democratic freedoms, constitutional and judicial independence have been made. It is hoped that the detailed examination and analysis contained in the previous chapters will clearly establish the hollowness and falsity of these allegations. Wherever it is found necessary restraints should be put on property rights which eminent Judges like Hidayatullah and Mathew have found it wrong to have been included in the Fundamental Rights Chapter.

What is intended is not the destruction of property right but the equitable distribution of wealth and the removal of the concentration of wealth and prevention of the exploitation of man by man or group of men or class of men. Strong words have never broken bones. Neither will glib phrases or learned thesis and veiled threats (such as the one Mr. Palkhivala says that the rich have more fundamental means than fundamental rights) will not frighten anybody.

The Government or the ruling party is not bound or fettered by rigid dogmas or theories. They make their assessments in the light of existing hard facts of life and society and have realised that facts are stubborn things and not easy to be bent according to doctrines and fossilised theories and dogmas. They earnestly believe that existing theories have to be altered and modified according to the Indian conditions and if necessary suitable new theories have to be evolved. This is so because it has been found that no country in the world has bodily transported theories from abroad and applied them without consideration for the special circumstances and social forces existing in the country.

While believing in the basic concepts of democracy, it is seen that democracy varies from country to country. A French Abraham Lincoln is quite different from the original. We get a Russian Marx, a Chinese Marx and a Yugoslav Marx, each having his own approaches and solutions. Therefore, when one speaks of Socialism, it is Indian Socialism one aims at. While the fundamental concepts, objectives and purposes would necessarily tally with the generally accepted basic Socialist principles, adjustments necessary to suit our conditions will have to be made.

The abject poverty and misery of the Indian masses impart compelling urgency. They cannot afford to wait. Any failure, faltering or delay will result in the destruction of the entire system we hold so dear. It is through democracy based on universal adult franchise and the parliamentary system that the objective of socialism has to be achieved. For quicker results and by the pressure of a feeling of urgency methods and means other than democratic may seem to be attractive. But inspite of the apparent attraction it will be seen that one has no alternative other than the democratic one for lasting peace, security and progress.

Institutions forged in violence and bloodshed will not last and will perish in violence and bloodshed. The quicker results which may be obtained will have to pay a heavy price and it will be found that the price will be too dear and heavy.

Like in any other society, conflicts are bound to arise in India not only between the claims of individuals against the State but also between individuals, groups and classes. The function of the State will not stop merely at what Ferdinand Lassalle calls the function of a "night watchman." The State will have to take positive steps for the achievement of its sacred goal

and that too on an urgent and priority footing. The extreme Right as well as the extreme Left will be equally dangerous to democracy, secularism and genuine socialism. It will be a hard and difficult task for the captains of the State to steer the ship of progress between the twin mortal perils of Scylla and Charybdis, the two political extremists of the Right and the Left. But it has to perform this essential though difficult duty and it shall be the endeavour and duty of the present Government and ruling party to discharge it.

In this Herculean effort they shall not bend or buckle, flag or flounder and they shall never fail. The slings and arrows of outrageous political propaganda will be warded off by the thick and impenetrable armour of the people's mandate.

APPENDIX I

PART III

FUNDAMENTAL RIGHTS

General

Definition

12. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

Laws inconsistent with or in derogation of the fundamental rights.

13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless, the context otherwise requires,—

(a) "Law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territorry of India the force of law;

(b) "Laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwith-

standing that any such law or any part thereof may not be then in operation either at all or in particular areas.

[1](4) Nothing in this article shall apply to amendment of this Constitution made under article 368.

Right to Equality

Equality before law.

14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Prohibition of discrimination on grounds of religion, race, caste sex, or place of birth.

15. (1) The State shall not discriminate against any citizen on ground only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

[2](4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially

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1. Ins. by the Constitution (Twenty-fourth Amendment) Act, 1971, s. 2
2. Added by the Constitution (First Amendment) act, 1951, s. 2.

and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.)

Equality of opportunity in in matters of public employment.

16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any emplopment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an [1]office (under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory) prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the service under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person

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1. Subs. by the Constitution (Seventh Amendment) Act, 1956, s, 29 and Sch,, for "under any State specified in first Scheduled or any local or other authority within its territory, any requirement as to residence within that State".

professing a particular religion or belonging to a particular denomination.

Abolition of Untouchability.

17. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Abolition of title.

18. (1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Right to Freedom

19. (1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) to acquire, hold and dispose of property; and

(g) to practise any profession, or to carry on any occupation, trade or business.

[1](2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [1](the sovereignty and integrity of India,) the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.)

(3) Nothing in sub-clause (b) of the side clause shall affect the operation of any existing law in so for as it imposes, or prevent the State from making any law imposing, in the interests of [2](the sovereignty and integrity of India or) public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interest of [3](the sovereignty and integrity of India or) public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said

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1. Subs. by the Constitution (First Amenement) Act, 1951 s. 3, for the original cl. (2) (with retrospective effect).
2. Ins. by the Constitution (Sixteenth Amendment) Act, 1963, s. 2.
3. Subs. by the Constitution (First Amendment) Act, 1951, s. 3, for certain original words.

sub-clauses either in the interests of the general public or for the protection of the interest of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, 1 (nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.)

Protection in respect of conviction for offences.

20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No persons accused of any offence shall be compelled to be a witness against himself.

Protection of life and personal liberty.

21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

Protection against arrest and detention in certain cases.

22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply.

(a) to any person who for the time being is an enemy alien ; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months, that there is in its opinion sufficient cause for such detention :

Provided that nothing in this sub-clause shall authorise the detention of any person

beyond the maximum period prescribe by any law made by Parliament under sub-clause (b) of clause (7) ; or

(b) Such person is detained in accordance with the provisions of any law made by Parliament under sub-clause (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may be law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4).

(b) The maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention ; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

Rights against Exploitation

Prohibition of traffic in human beings and forced labour.

23. (1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the state shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Prohibition of employment of children in factories etc.

24. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Right to Freedom of Religion

Freedom of conscience and free profession, practice and propagation of religion.

25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall effect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice ;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I. The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II. In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Freedom to manage religious affairs.

26. Subject to public order, morality and health every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes ;

(b) to manage its own affairs in matters of religion ;

(c) to own and acquire movable and immovable property ; and

(d) to administer such property in accordance with law.

Freedom as to payment of taxes for promotion of any particular religion.

27. No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Freedom as to attendence at religious instruction or religious worship in certain educational institutions.

28. (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction

shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Cultural and Educational Rights

Protection of interests of minorities.

29. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Right of minorities to establish and administer educational institutions.

30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Right to Property

Compulsory

31. (1) No person shall be deprived of his property save by authority of law.

Acquisition of property

[1].[2](2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law ; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash :

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2 A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property notwithstanding that it deprives any person of his property.

[3](2B) Nothing in sub-clause (f) of clause (1) of

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1. Subs. by Constitution (Fourth Amendment) Act, 1955, s. 2, for the original clause.
2. Subs. by the Constitution (Twenty-fifth Amendment) Act, 1971, S. 2, for clause (2) (w.e.f. 20-4-1972).
3. Ins. by the Constitution (Twenty-fifth Amendment) Act, 1971, s. 2. (w.e.f. 20-4-1972).

article 19 shall affect any such law as is referred to in clause (2).

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by much Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstaning anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of cause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this

Constitution may within three months from such commencement be submitted to the President for his certification ; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

Saving of laws providing for acquisition of estates, etc.

[1]**31**-A. [2](1) Notwithstanding anything contained in article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement,

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1. Ins. by the Constitution (First Amendment) Act, 1951, s. 4 (with retrospective effect).
2. Subs. by the Constitution (Fourth Amendment) Act, 1955, S. 3, for the original clause (with retrospective effect).

lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31 :

(Provided further that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent :

[1](Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.)

(2) In this article,—

[2](a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in

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1. Ins. by the Constitution (Seventeenth Amendment) Act, 1964, s. 2.
2. Subs. by the Constitution (Seventeenth Amendment) Act, 1964, s. 2, for sub-clause (a) (with retrospective effect).

force in that area and shall also include—

(i) any jagir, inam or muafi or other similar grand and in the States of [1](Tamil Nadu) and Kerala, any Janmam right ;

(ii) any land held under ryotwari settlement ;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans ;)

(b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, [2](raiyat, underraiyat) or other intermediary and any rights or privileges in respect of land revenue.)

Validation of certain Acts and Regulations.

[3](**31B**. Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule for any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgement, decree or order of any

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1. Sub. by the Madras State (Alteration of Name) Act, 1968, (53 of 1968) s. 4 for "Madras" (w.e.f. 14-1-1969)
2. Ins. by the Constitution (Fourth Amendment) Act, 1955, s. 3. (with retrospective effect)
3. Ins. by the Constitution (First Amendment) Act, 1951, s. 5.

court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to any competent Legislature to repeal or amend it, continue in force.)

Saving of laws giving effect to certain directive principles.

[1](**31C**. Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31 ; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy :

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.)

Right to Constitutional Remedies

Remedies for enforcement of rights conferred by this Part.

32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

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1. Ins. by the Constitution (Twenty-fifth Amendment) Act, 1971, s. 3, (w.e.f. 20-4-1972)

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to excercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Power to Parliament to modify the rights conferred by this Part in their application to forces.

33. Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Restriction on rights conferred by this Part while matial law is in force in any area.

34. Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forteiture ordered or other act done under martial law in such area.

Legislation to give effect to the provisions of this Part.

35. Notwithstanding anything in this constitution,—

(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—

(i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34

may be provided for by law made by Parliament ; and

(ii) for prescribing punishment for those acts which are declared to be offences under this Part ;

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii) ;

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

Explanation—In this article, the expression "law in force" has the same meaning as in article 372.

APPENDIX II

PART IV

DIRECTIVE PRINCIPLES OF STATE POLICY

Definition.

36. In this Part, unless the context otherwise requires, "the State" has the same meaning as in Part III.

Application of the principles contained in this part.

37. The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.

State to secure a social order for the promotion of welfare of the people.

38. The State shall strive to promote the welfare of he people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

Certain principles of policy to be followed by the State.

39. The State shall, in particular, direct its policy towards securing—

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood ;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good .

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment ;

(d) that there is equal pay for equal work for both men and women ;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength ;

(f) that childhood and youth are protected against exploitation and against moral and material abandonment.

Organisation of village panchayats.

40. The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.

Right to work, to education and to public assistance in certain cases.

41. The State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Provision for just and humane conditions of work and maternity relief.

42. The State shall make provision for securing just and humane conditions of work and for maternity relief.

Living wage, etc., for workers.

43. The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensur-

ing a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas.

Uniform civil code for the citizens.

44. The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

Provision for free and compulsory education for children.

45. The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Promotion of educational and economic interests of S.C/, S.T. and other weaker sections.

46. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

47. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption execpt for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Organisation of agriculture and animal husbandry.

48. The State shall endeavour to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the

slaughter of cows and calves and other milch and draught cattle.

Protection of monuments and places and objects of national importance.

49. It shall be obligation of the State to protect every monument or place or object of artistic or historic interest, 1 (declared by or under law made by Parliament) to be of national importance, from spoilation, disfigurement, distruction, removal, disposal or export, as the case may be.

Separation of judiciary from executive.

50. The State shall take steps to separate the judiciary from the executive in the public services of the State.

Promotion of international peace and security.

51. The State shall endeavour to—

(a) promote international peace and security ;

(b) maintain just and honourable relations between nations ;

(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another ; and

(d) encourage settlement of international disputes by arbitration.

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1. Subs. by the Constitution (Seventh Amendment) Act, 1956, s. 27, for "declared by Parliament by law".

APPENDIX III

Articles 13 and 368 as they existed both before and after amendment made by the Twenty-fourth Amendment Act.

Before the Amendment	*After the Amendment*
13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.	**13.** (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.	(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
(3) In this article, unless the context otherwise requires,—	(3) In this article, unless the context otherwise requires,—

Before the Amendment	*After the Amendment*
(a) "law" includes any Ordinance, order, byelaw, rule, regulation, notification, custom or usage having in the territory of India the force of law ;	(a) "law" includes any Ordinance, order, byelaw, rule, regulation, notification, custom or usage having in the territory of India the force of law ;
(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of the Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.	(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. (4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.
368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of	368 (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way

Before the Amendment	*After the Amendment*
Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill :	of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article. (2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall Stand amended in accordance with the terms of the Bill :
Provided that if such amendment seeks to make any change in—	Provided that if such amendment seeks to make any change in—

Before the Amendment	*After the Amendment*
(a) article 54, article 55, article 73, article 162 or article 241, or	(a) article 54, article 55, article 73, article 162 or article 241, or
(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI or	(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
(c) any of the Lists in the Seventh Schedule, or	(c) any of the Lists in the Seventh Schedule, or
(d) the representation of States in Parliament, or	(d) the representation of States in Parliament, or
(e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.	(e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.
	(3) Nothing in article 13 shall apply to any amendment made under this article.

ERRATA

Page	*Line*	
12	22	*Delete* "s" at the end of the line.
21	6	*Delete* "is".
23	1	*for* "phenomena" *substitute* "Phenomenon".
35	15	*for* "intervence" *substitute* "intervene".
36	13	*for* "ludicurous" *substitute* "ludicrous".
41	27	*for* "I" substitute "II".
42	26	*Insert* "to" between "production" and "the".
43	15	*for* "securing" *substitute* "securing".
44	2	*for* "add" *substitute* "and".
49	13	*for* "prion" *substitute* "prior".
49	18	*for* "felt" *substitute* "left".
53	16	*for* "puplic" *substitute* "public".
54	16	*for* "privlieged" *substitute* "privileged".
56	1	*for* "povery" *substitute* "poverty."
56	2	*insert* "(page 55)" *after* "table".
120	13	*for* "wishpered" *substitute* "whispered".
132	24	*for* "effect" *substitute* "affect".
143	14	*for* "having" *substitute* "have".
144	28	*Delete* "will not".

(*Continued from first flap*)
of every citizen should develop and flourish. The author holds that various laws and institutions are for men and not men for the institutions and laws. Mr. Palkhivala's assertion that our Constitution has been defaced and defiled has been strongly controverted and the author has shown that on the contrary the Constitution has been saved from destruction by a possible violent revolution and transformed into an effective and dynamic instrument of social progress.

Dr. V.A. SEYID MUHAMMAD is an eminent lawyer. a prominent author and a Member of the Rajya Sabha.

Born on May 19, 1923 in Kerala, he passed from Aligarh Muslim University with an M.A. and a first Class in L.L.B. in 1946. Called to the Bar (Inner Temple, London) in 1953, he subsequently did research at Palais de Nations and Gatt Secretariat, Geneva for his doctoral thesis on "International Economic Law", which earned him a Ph. D. from the University of London (1955). His book on "The Legal Framework of World Trade" has been published by Stevens and Sons, London.

Starting his legal career at Calicut (Kozhikode), Dr. Muhammad worked in the Chamber of the late M.C. Setalvad. He has been the standing Counsel for Kerala and also for the Union of India in the Supreme Court.

Formerly Joint Editor of the "Indian Advocate", Organ of the All India Bar Association, he has Contributed to several leading journals. He is also the author of a paper on "Judicial Precedents and Codification of Law", which he read out at the Imperial and Commonwealth Law Conference at Sydney in 1965.

Dr. Muhammad also served as the Senior Adviser to the Indian Delegation to the U.N. in 1971.

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